TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 406.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, FREDERIC P. OLCOTT, ET AL., PLAINTIFFS IN ERROR,

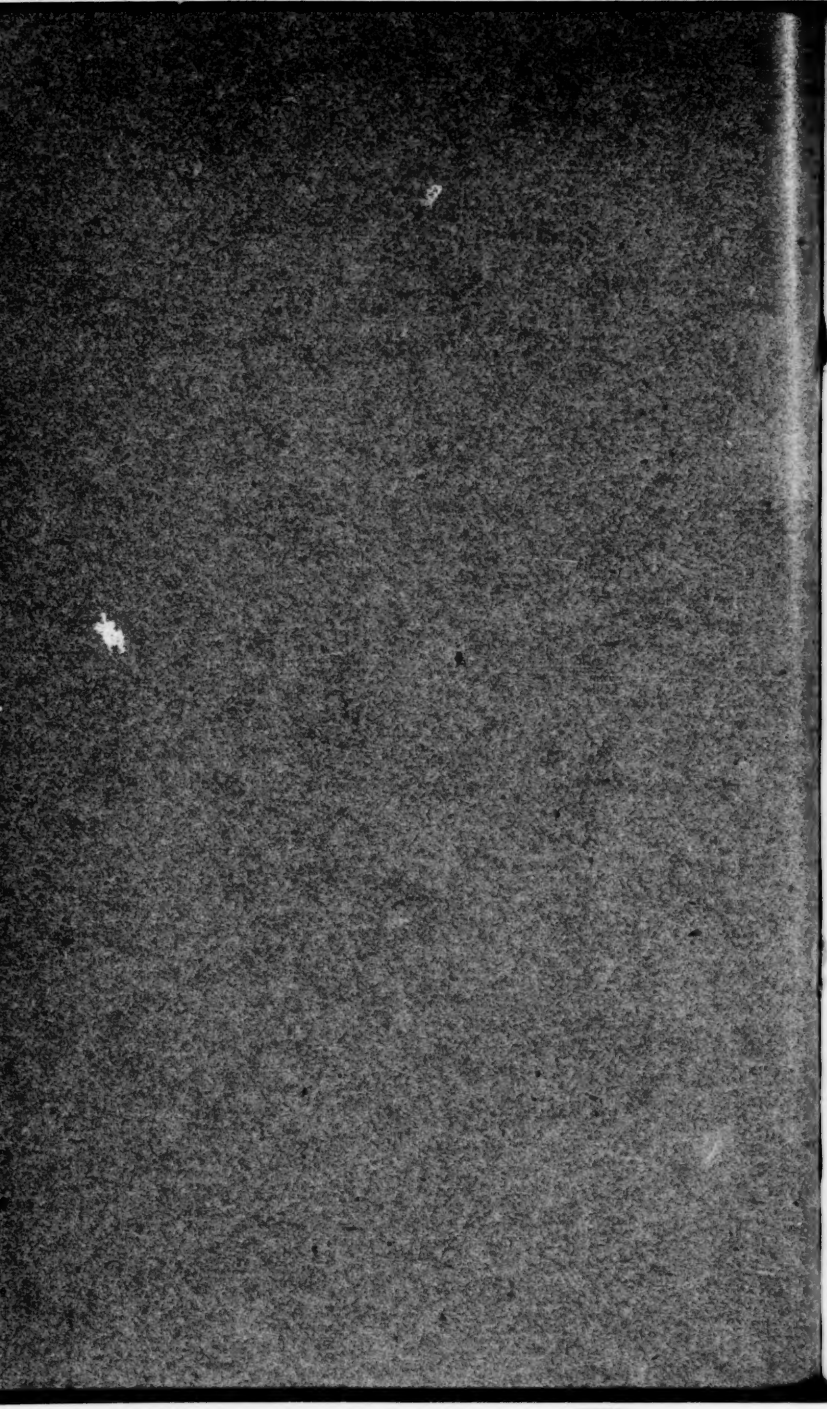
vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JUNE 30, 1897.

(16,619.)



BLEED THROUG

(16,619.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 406.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, FREDERIC P. OLCOTT, ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 2, 1897.

BLEED THR

1 *Caption.*

THE STATE OF TEXAS, }
County of Nolan. }

At a term of the district court begun and holden at Sweetwater, within and for the county of Nolan, before the Hon. Wm. Kennedy, and ending on the 22nd day of April, A. D. 1893, the following case came on for trial, to wit:

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, FREDERICK P. OLCOTT, and GEO. E. DOWNS.

Plaintiff's Original Petition. Filed Feb. 3, 1890.

In the District Court of Nolan Co., April Term, 1890.

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, FREDERICK P. OLCOTT, and GEO. E. DOWNS.

To the honorable judge of said court:

The State of Texas, hereinafter styled plaintiff, comes now, by its attorney general, J. S. Hogg, who acts by lawful authority of law herein, complaining of The Houston & Texas Central Railway Co., Frederick P. Olcott, and Geo. E. Downs, who will hereinafter be styled defendant-, and alleges, avers, and charges:

1. That the Houston & Texas Central Railway Company is a railroad corporation, duly incorporated and acting as such under the laws of Texas, and has its domicile and general office at Houston, in Harris county, said State; that said Frederick P. Olcott and Geo. E. Downs are resident citizens of the county of Kings, State and city of New York.

2. That the plaintiff is now and has always been the owner in fee-simple and is now and has always been entitled to the
2 possession, use, and enjoyment of sixteen sections of land, of 640 acres each, situated and lying in the county of Nolan, State of Texas, in that certain block of Houston & Texas Central Railway surveys known as block No. 64; all of which are more particularly described and designated by the following tabulated statement, showing the number of each certificate, the date of its issuance, the name of the grant[illegible]he date of its location and survey, the county in which locat[illegible]d surveyed, the number of acres called for in each certificate, the date of its return to and file in the general land office, the name of the land or surveying district in which located, the file number, the number of miles of main track and the number of miles of sidings called for in each certificate and for which it was issued, the section or survey number, and the block number, as follows, to wit:

Number of certificate.	Date of certificate.	To whom issued.	When located and surveyed.	County where located.	Number of acres.	Date of return to & file in the general land office.	District in which located.	File number.	Miles of railway.		Survey No.	Block No.
									Main track.	Sidings.		
38/4438	July 1, 1872	Houston & Tex. Central R'y Co.	June 7, 1873	Nolan....	640	Nov. 20, 1873	Bexar...	5503	93 132/172	2 33/38	169	64
38/4443	"	"	"	"	"	"	"	5508	"	"	191	64
40/4997	"	"	June 1, 1873	"	"	"	"	5386	"	"	199	64
40/4998	"	"	"	"	"	"	"	5387	"	"	201	64
40/4999	"	"	"	"	"	"	"	5388	"	"	203	64
40/5001	"	"	"	"	"	"	"	5390	"	"	207	64
40/5002	"	"	"	"	"	"	"	5391	"	"	209	64
40/5003	"	"	"	"	"	"	"	5392	"	"	211	64
40/5004	"	"	"	"	"	"	"	5393	"	"	213	64
40/5005	"	"	"	"	"	"	"	5394	"	"	215	64
40/5006	"	"	"	"	"	"	"	5395	"	"	217	64
40/5019	"	"	"	"	"	"	"	5517	"	"	243	64
40/5020	"	"	"	"	"	"	"	5518	"	"	245	64
40/5021	"	"	"	"	"	"	"	5519	"	"	247	64
40/5022	"	"	"	"	"	"	"	5520	"	"	249	64
40/5023	"	"	"	"	"	"	"	5521	"	"	251	64

3

4 3. That each of the foregoing described and enumerated land certificates was issued to and in the name of the Houston & Texas Central Railroad Company at the time and for the purposes indicated in the foregoing statement and *were* by said company, at the time indicated therein, located and surveyed upon the lands in controversy and *were* returned to and — now on file in the general land office, but that no patent has been issued on either of them; that by reason of said location and surveys defendants herein have unlawfully entered upon and taken possession of said lands, ejecting plaintiff therefrom, and now unlawfully withhold the same from plaintiff's possession, to plaintiff's damage.

Wherefore plaintiff brings this suit and prays judgment of the court giving its possession of the aforesaid premises and declaring the title to the same to be in plaintiff, and for damages and costs of suit.

4. Plaintiff further alleges, charges, and avers that each and all the said certificates hereinbefore described were issued to the Houston & Texas Central Railway Company on the respective dates indicated in said tabulated statement by the commissioner of the general land office of the State of Texas without authority of law and are null and void.

5. That all of said certificates were issued upon and for the construction of that portion of the Houston & Texas railroad extending from Brenham, in Washington county, to Austin, in Travis county, which was constructed, completed, and put in running order on or about Feb. 21st, A. D. 1872.

6. That at the time of the construction and completion of said portion of said road as above set forth and at the time of the issuance of said certificates as hereinbefore alleged there was no law, general or special, in force in the State of Texas authorizing or permitting the issuance of land certificates to the Houston & Texas Central railway

5 in any quantity or for any purpose whatsoever, and plaintiff here charges and avers that the action of the commissioner of the general land office in issuing and delivering to said Houston & Texas Central Railway Company said land certificates and permitting them to be located and surveyed upon the lands hereinbefore described and returned to and filed in the general land office of the State was, as before alleged, had and done wholly without authority of law and in plain violation of the constitution and laws of the State of Texas in force at the time.

7. That each of the said certificates recites upon its face that it was issued for the construction and completion of ninety-three & $\frac{32}{176}$ths miles of main track and two & $\frac{5}{6}$th miles of sidings between the said points of Brenham and Austin.

8. That the aggregate number of miles of sidings, as shown upon the face of said certificates and for the construction of which said certificates were in part issued, is two miles and 2,800 feet; that there was issued to and received and located by said railroad company land certificates at the rate of sixteen sections, of 640 acres each, for each mile and fractional part of a mile of said sidings in addition to a like quantity received and located by said company on ac-

count of said main track; that said sidings were at the time of their construction and have been ever since that time necessary appurtenances and adjuncts to and parts of said railroad and were and are essential to the use and operation of said railway; that said railway at no time was or could have been complete and in good running order without said sidings; that without them said road was not substantially built or fully equipped for the transportation of passengers or freight, nor would said road without them have been constructed in accordance with the provisions of said railway
6 company's charter or the general laws in force in this State regulating railroads.

9. That there was not at the time of the issuance of said certificates nor at any time prior or subsequent thereto any law, general or special, in force in this State authorizing the issuance of land certificates to said railway company for or on account of the construction of sidings; that it cannot be ascertained from the face of said certificates or from the location or survey of said lands or by any other means which of said certificates were issued, located, or surveyed exclusively on account of the construction of sidings and which were issued, located, or surveyed exclusively on account of the construction of main track of said railroad.

10. That each and all of the said certificates were by their express terms and conditions to be located only upon the unreserved, vacant, and unappropriated public domain of the State of Texas; that in violation of said terms and conditions and of the laws of this State, and also of a special law entitled "An act to adjust and define the rights of the Texas & Pacific Railway Company within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean," passed on the 2nd and which took effect on the 21st day of May, 1873, the said defendant company, on the respective dates, as shown by the tabulated statement, as hereinbefore set forth, did locate and have each and all of the aforesaid certificates located and surveyed upon the reserved and appropriated public domain described within said act, which is here referred to and made a part hereof; that the lands so located by the said defendant company were a part of the lands appropriated, reserved, and set aside by sections five and six and other provisions of said special law for the benefit of and accepted by the said Texas & Pacific Railway Company and the State school fund, and
7 were by said act withheld and reserved from appropriation, location, and survey, except for the said expressed purposes, until the years 1876 and 1880 respectively, as therein provided, and since said dates have by the general laws of the State continued to be reserved from location and survey by any and every class of certificates.

11. That by reason of the unlawful acts of said railway company in obtaining and holding the aforesaid certificates and in locating them upon the State's said appropriated and reserved public domain it holds out to the world that it has some kind of title to the aforesaid-described property, and in that way a cloud is cast upon the State's title to the same.

Wherefore the State prays for judgment of possession of and title to said land, for a decree cancelling each of the said certificates hereinbefore described, and also removing the clouds cast upon her title by the location and survey of the same upon the lands hereinbefore described, and for damages, costs, and for general and special relief.

JAS. S. HOGG,
Att'y Gen'l, and
R. H. HARRISON, *Assistant,*
For the State.

Endorsed as follows, to wit:
No. 269. The State of Texas *vs.* Houston & Texas Central Railway Company, Fred. P. Olcott, & Geo. E. Downs. In district court, Nolan county. Plaintiff's original petition. This action is brought as well to try title as for damages. Filed February 3rd, 1890. John C. Cox, clerk district court, Nolan county, Texas.

8 *Plaintiff's First Supplemental Petition.*

Filed March 30, 1893.

In the District Court, Nolan County.

THE STATE OF TEXAS
vs.
F. P. OLCOTT *et al.*

The State of Texas, plaintiff herein, with leave of the court, file this the 1st supplemental petition.

The said plaintiff says that the second amended original answer of defendant, heretofore filed in this court on March 30th, 1893, is insufficient in law, and of this prays the judgment of the court.

Replying to said amended answer, the plaintiff denies all and singular its allegations therein and demands strict legal proof thereof.

Replying specially thereto. the plaintiff represents and avers:

1. The plaintiff denies that defendants filed upon the land in controversy prior to the passage of the act of May 2, 1873, as alleged, but plaintiff avers that if any such file was made it was abandoned and the same renewed on the 28th day of July, 1873, and no survey of the land and no return of field-notes were made thereunder.

2. The plaintiff denies that the defendants company completed its road in the manner and at the time required by law. On the contrary, plaintiff avers that *on* the special act of Sept. 21st, 1866, which superseded all other laws as to said company, provided, among other things, that said company should construct and put in running order a section of 25 miles of additional road to that then built within one year from January 1st, 1867, or fifty miles within two years from that date, and such grant of land thereby made should be discontinued when said company should fail to construct and complete at least 25 miles of the road contemplated

by the charter each year after the construction of said first-mentioned fifty miles, yet said defendant company failed to comply with
9 said act as to the construction of the road and said land was discontinued and said certificate involved in this suit was issued in violation of law.

3. The plaintiff denies that the defendants are entitled to the certificates in suit under the alleged special act of August 15th, 1870, because, among other reasons—

(A.) The said act was never enacted into a law by the legislature of the State of Texas and from that time until the present it has been repudiated by each and every executive of the State and each and every one of said executives have refused to recognize or be bound thereby.

(B.) Said act does not grant to defendant- land for the construction of the road from Brenham to Austin, and if it can be or is so construed it is in that particular in violation of art. 10, section 6, of the constitution of 1869, and the certificates were issued contrary to law.

(4.) The plaintiff specially denies that defendant company was authorized to build the road from Brenham to Austin by any law of this State until the alleged act of August 15th, 1870, if then, which is denied, and it denies that it was entitled to any land grant for building said road prior to said pretended law.

(5.) The plaintiff alleges that the road from Brenham to Austin is a branch of the main line of the defendant company's road, and by the act of January 30th, 1854, and other laws applicated to said company it is expressly provided that railway company shall not receive land for branch roads.

Wherefore the plaintiff prays as in the original petition.

C. A. CULBERSON, *Att'y Gen.*

Endorsed as follows, to wit:

10 No. 269. The State of Texas *vs.* Olcott *et al.* 1st supplemental petition. Filed March 30th, 1893. John C. Cox, clerk district court, Nolan county, Texas.

Defendants' Second Amended Original Answer.

Filed March 30, 1893.

In District Court of Nolan County, Texas.

THE STATE OF TEXAS
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.*

Now comes the defendants The Houston and Texas Central Railway Company and F. P. Olcott, and, leave of the court having been had and obtained, file this their second amended original answer in lieu of their answers filed therein on the 31st day of March, A. D. 1892, and in lieu of all other pleadings filed by them herein, and for amendment saith—

That the defendants The Houston and Texas Central Railway Company and Frederick P. Olcott say that Charles Dillingham is the receiver of said railway company, duly appointed by the honorable the circuit court of the United States in and for the fifth judicial circuit and eastern district of Texas, in possession of the property and lands sued for in the above cause, and authorized by said court to defend this cause for and on behalf of and in the name of the said railway company, and for plea to the jurisdiction of this honorable court say—

That said Houston and Texas Central Railway Company and all its lands, franchises, and properties of every nature and description whatsoever were at the time of the institution of said suits against it and long prior thereto and ever since have been and still are in the possession of the honorable the United States circuit court for the eastern district of Texas, through its receivers; that the same were placed in the hands of Charles Dillingham,
Nelson S. Easton, and James Rintoul, as joint receivers, by
11 virtue of an order and decree made on May 26th, 1886, in
consolidated cause No. 198 of the equity docket of said court, entitled Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, *vs.* The Houston and Texas Central Railway Company *et als.*, which said order was modified and superseded by another order of date December 7, 1888, relieving said Easton and Rintoul from further duty as receivers in said cause and continuing Charles Dillingham as sole receiver; which said order was in the words and figures following, viz:

"This cause came on to be heard at this term on the application of Frederick P. Olcott *et al.* to relieve Nelson S. Easton and James Rintoul from further duty as receivers herein and for other purposes, and was argued by counsel; whereupon and on consideration whereof it is ordered, adjudged, and decreed that Nelson S. Easton and James Rintoul, two of the joint receivers herein, be, and the same are hereby, relieved from any further duty as joint receivers in this cause, and that the said Easton and Rintoul do pass their accounts to date before John C. Winter, special master in chancery herein. It is further ordered, adjudged, and decreed that Charles Dillingham, the other of the joint receivers hereinbefore appointed, be, and he is hereby, continued as sole receiver in this cause, with all the powers, rights, duties, and obligations now resident in him as joint receiver and heretofore established by the orders herein entered, appointing him and said Nelson S. Easton and James Rintoul joint receivers. It is further ordered, adjudged, and decreed that all rights, claims, and demands arising against the said joint receivers during their administration shall be prosecuted against the said Charles Dillingham alone, and that the said Charles Dillingham shall alone have the right to prosecute and defend all rights, claims, and demands of every kind and nature arising in behalf of or against the said joint receivers or in behalf of or
12 against the Houston and Texas Central Railway Company,
and to prosecute or defend any rights, claims, or demands or actions at law or in equity which the said joint receiver might have

prosecuted or defended under the orders of this court. It is further ordered, adjudged, and decreed that the said Charles Dillingham, during his sole receivership herein and until the property in his possession shall be delivered to the respective purchasers, Frederick P. Olcott and George E. Downs, shall have power and authority to collect for account of the parties in interest the land notes in his possession as sole receiver, and on payment to him of said notes to execute releases of the mortgages securing said notes on the land sold, and that he shall further have the power to make sales of and deeds for the lands in his possession heretofore sold to said purchasers, Olcott and Downs, with the direction, however, to report all such sales before deeds are given to the said Frederick P. Olcott of the lands bought by him, and to George E. Downs and the Farmers' Loan and Trust Company, trustee, of the lands bought by the said George E. Downs, with the right in said Frederick P. Olcott and the said George E. Downs respectively to prevent any such sales by timely objection thereto, it being specially understood that no sales of lands bought by said Downs and covered by the mortgage to the Farmers' Loan and Trust Company as trustee of the first mortgage of the Waco and Northwestern division shall be made free of said mortgage except by and with the consent and deeds of said Farmers' Loan and Trust Company, trustee, as aforesaid."

That under and by said order said Easton and Rintoul were relieved, and said receivership extended and continued with Charles Dillingham as sole receiver thereof, with power to sue and defend all suits in respect to the property of the Houston and Texas Central Railway Company, until the same be turned over to the pur-
13 chasers thereof or he be relieved of his trust as such receiver.

That again, on, to wit, December 9, 1892, the following order was made by Hon. L. Q. C. Lamar, viz:

United States Circuit Court, Eastern District of Texas.

STEPHEN W. CAREY *et al.*, Appellants,
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, Appellees.

It appearing to my satisfaction from the annexed petition and affidavit that the appellants have taken and perfected appeals to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, which appeals are taken in good faith, and that no injury can accrue to the appellees by a stay of proceedings as herein directed pending the hearing and decision of the said appeals—

Now, therefore, on motion of R. H. Landale, solicitor for complainants—

It is ordered that pending the hearing and decision of the appeals taken by the complainants to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, Charles Dillingham, the re-

ceiver of the Houston and Texas Central Railway Company, be, and he is hereby, stayed from surrendering or delivering possession of the Houston and Texas Central Railway Company or any of the lines of railway formerly operated by the Houston and Texas Central Railway Company and of which he is now possessed as receiver, and from permitting the said railways to be operated by any corporation or person other than himself, with liberty to the receiver, the appellees, or any of them to apply to me to vacate the said State if the said appellants fail to prosecute the said appeals with due diligence.

14 Dated Washington, December 9, 1892.

L. Q. C. LAMAR,
Associate Justice of the Supreme Court of the United States, Assigned to the 5th Circuit.

That under and by virtue of said order said Dillingham was at the date of the institution of this suit and long prior thereto had been and still is in possession of all of said property as the receiver thereof, and that he has not been relieved of his said trust; that said honorable circuit court therefore has exclusive jurisdiction to decide upon conflicting claims to the ultimate possession and control of the said property, and that this suit was filed without leave of said honorable circuit court, and that this honorable court is therefore without jurisdiction in the premises.

Wherefore they pray judgment whether this court can or will take further cognizance of this suit.

T. D. COBBS,
Attorney for Defendants.

Should said plea to the jurisdiction of this court be overruled, these defendants, not waiving any objection thereto, but insisting upon the same, show the court that there is a defect of parties to this suit in this, that Charles Dillingham was appointed as the receiver of all the properties of the Houston and Texas Central Railway Company by the United States circuit court for the eastern district of Texas in consolidated cause No. 198, of Nelson S. Easton *et al. vs.* Houston and Texas Central Railway Company *et al.*, prior to the institution of this suit, and is now the receiver thereof, as shown in defendants' plea, as aforesaid, to the jurisdiction of this court, to which plea these defendants refer *to* as a part thereof, and the said Charles Dillingham, as receiver thereof, is invested

15 with full power to sue and defend all suits in respect to the property of the Houston and Texas Central Railway Company until the same be turned over to the purchaser thereof or he be relieved of his trust as such receiver.

That the said property is still in his hands as the receiver thereof, and that he has not been relieved of his said trust; that said honorable circuit court thereof has exclusive jurisdiction to decide upon conflicting claims to the ultimate possession and control of said property, and as the receiver of said property (which property is in *custodia legis*) and as the officer of said court the said Charles Dil-

lingham, as receiver, has such interest in said property and the subject-matter of the litigation as to make him a necessary party hereto, and the said defendants here now plead the same and pray the judgment of the court.

T. D. COBBS,
Attorney for Defendants.

Sworn to and subscribed before me this 30th day of March, A. D. 1893.

JOHN C. COX,
Clerk Dist. Court, Nolan Co., Texas.

Should said plea be overruled or be held not to be well taken, then the defendants as aforesaid, reserving all exceptions to the ruling of the court on said pleas and not waiving same, now except to plaintiff's petition:

1. Because the same shows upon its face that the plaintiff is not entitled to recover in said suit in the manner and form as prayed, and of this defendants pray judgment of the court.

2. Defendants further specifically except to plaintiff's petition because the same does not specifically set out the wrongs, injuries, and trespasses, if any, with such particularity as would entitle or authorize the State of Texas to recover in this action, and defendants are not put upon any notice whatever of the particular claim or claims of the State of Texas, and of this the defendants pray the judgment of the court.

16

3. Because the same is wholly insufficient to have and to recover as therein prayed.

4. Because the said petition does not show affirmatively that the said attorney general, who instituted the suit, had authority to do so either under the law of this State or was properly directed to do so by the governor of the State of Texas. Defendants therefore pray the court that the said plaintiff be required to show whether or not he had authority to institute the suit and whether or not the same was instituted by the written request and direction of the executive.

5. Defendant- specially excepts to that part of paragraph 10 of *defendant's* petition which sets out what purports be a special law, entitled "An act to adjust and define the rights of the Texas & Pacific Railway Company within the State of Texas in order to encourage the speedy construction of a railway through the State to the Pacific ocean," because the said law, so far as it undertook to grant lands therein, was unconstitutional, null and void, and conferred no rights thereunder.

And of this prays the judgment of the court.

T. D. COBBS,
Attorney for Defendants.

Should said plea and exceptions be overruled, then defendants deny each and every allegation in plaintiff's petition contained, and of this put themselves upon the country.

II.

For further answer in this behalf defendants say that on
17 or about the fourth day of May, 1888, a certain decree was rendered in the honorable circuit court of the United States for the eastern district of Texas, in a certain cause pending therein under the title of Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, *vs.* The Houston and Texas Central Railway Company *et als.*, and bearing No. 198, consolidated cause, on the chancery docket of said court, at Galveston, wherein and whereby it was ordered, adjudged, and decreed that the said Houston and Texas Central Railway Company should, within thirty days from the date thereof, pay into said court certain sums of money which by said decree were adjudged to be due to the holders of certain bonds and coupons secured by certain deeds of trust or mortgages described in said decree, and whereby it was further ordered, adjudged, and decreed that in default of such payments all of the mortgaged premises and property, real and personal, rights, privileges, immunities, and franchises, hereinafter more particularly described, should be sold, without appraisement or redemption, at public auction, in the manner and upon the terms specified in said decree, now on record in said honorable court in the cause aforesaid, and to which defendants crave leave to refer as a part of this answer in like manner as if the same were herein transcribed at length.

III.

That the said Houston and Texas Central Railway Company wholly fail- to pay the sums of money adjudged by said decree to be due within the time ordered or otherwise, and thereupon the said sale took place in accordance with the terms of said decree.

IV.

That at said sale, which took place in the city of Galves-
18 ton on the 8th day of September, 1888, F. P. Olcott became the purchaser of the whole of the properties of every sort and description of the said Houston and Texas Central Railway Company, wherever situated and of whatever sort or nature, with the exception, however, of the railroads, lands, and other property subject to the first-mortgage lien on the Waco and Northwestern division, dated June 16th, 1875, and executed to the Farmers' Loan and Trust Company as trustee, and that the property so acquired by said Olcott included the railroad of the said company from Houston to Denison and from Hempstead to Austin, with road-beds, rights of way, buildings, and improvements of every kind and description connected with the said railroads or any part thereof, and all their appurtenances, material, supplies, and personal property of every kind procured for or — any manner connected with said railroad or used thereon or any part thereof; also all the chartered rights, liberties, privileges, immunities, and franchises of said railway company of every kind and description whatsoever appertaining to said

railroad-; also all the lands which have been received from the State of Texas for the construction of railways of said railway company, not including the lands covered by the first mortgage on the said Waco and Northwestern division, and also all other lands, town lots or blocks, and real estate of every kind and description to which said railway company had title, claim, or equitable ownership, and also all the tools, earnings, freights, receipts, and moneys of every kind and description of said railway company from said railways, and all personal property, bonds, stocks, choses in action, assets, accounts, and claims of every kind of said railway company appertaining to said railways, saving and reserving such portions of said lands as had been theretofore and prior to May 4, 1888, sold to other purchasers, but including all securities, unpaid considera-
19 tion of said sales, the amount of such lands so purchased by said F. P. Olcott being estimated to amount, exclusive of the lands pertaining to the railways themselves, to about four million three hundred and forty thousand three hundred and thirty-nine (4,340,339) acres, the property so conveyed to F. P. Olcott being more particularly described as follows, to wit:

1. All the property and premises, rights, privileges, immunities, and franchises of every kind and description covered by the main-line first mortgage and Western Division first mortgage of the said Houston and Texas Central Railway Company, including securities which were the proceeds of land sales and including all the main line and Western division of the railway of said railway company, the main line commencing at Houston and extending to the Red river, in the State of Texas, through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, Limestone, Freestone, Navarro, Ellis, Dallas, Collin, and Grayson, a distance of about three hundred and forty-five (345) miles, and the Western division commencing at Hempstead and extending to the city of Austin through the counties of Waller, Washington, Lee, Fayette, Bastrop, and Travis, a distance of about one hundred and eighteen and three-quarter-(118¾) miles, including in each case all the roadways and superstructures, side tracks, depots, stations, water tanks, section-houses, round-houses, machine shops, terminal facilities, buildings, and lands constituting a part of said main line and of said Western division respectively, and all improvements, rolling stocks, materials, and other personal property belonging to said main line or to said Western division respectively, and all the chartered rights, liberties, privileges, immunities, and franchises of said railway company relating to said main line or to the said Western division respectively, and also ten (10) sections of land for each mile of said main line and Western division, saving and excepting such portions of said lands as have been heretofore and prior
20 to May 4, 1888, sold to other purchasers, and including all notes given to secure the credit portion of the prices of land sales, and such land so included in the purchase of the said F. P. Olcott being situated in the counties of Austin, Brown, Baylor, Borden, Clay, Concho, Caldwell, Chambers, Colorado, Crane, Comanche, Crockett, Dallam, Dickens, Fort Bend, Eastland, Fisher,

Foley, Grimes, Guadalupe, Hansford, Hardeman, Hardin, Harris, Hartley, Haskell, Henderson, Hill, Howard, Hutchinson, Hemphill, Jasper, Jones, Jefferson, Johnson, Jeff Davis, Kent, King, Knox, Liberty, Lipscomb, Mitchell, Moore, Navarro, Newton, Nolan, Ochiltree, Pecos, Polk, Potter, Presidio, Roberts, Robertson, Runnels, Reeves, Sabine, San Saba, San Jacinto, Scurry, Stonewall, Throckmorton, Taylor, Tom Green, Trinity, Waller, Walker, Wichita, Wilson, Ward, and Wilbarger, and being estimated to amount, exclusively of the lands pertaining to the railroad, to about two million five hundred and forty thousand three hundred and thirteen (2,540,313) acres.

2. All the land and property of every kind and description covered by the main-line and Western Division consolidated mortgage executed to the Farmers' Loan and Trust Company, dated October 1, 1872, which was not subject to either the main-line first mortgage or the Western Division first mortgage, said property including six (6) sections of land for each mile of said main-line and Western division, saving and excepting such portions of such lands as had been, prior to May 4, 1888, sold to other purchasers, and including all notes given to secure the credit portion of the price of land sales, the amount of such lands so conveyed, which are situated in the counties of Archer, Bastrop, Brazoria, Baylor, Borden, Caldwell, Coleman, Concho, Crockett, Crane, Dallam, Eastland, El Paso, Fisher, Foley, Fort Bend, Garza, Glasscock, Hansford, Hardeman,
21 Harris, Hartley, Haskell, Howard, Jasper, Jeff Davis, Kent, Knox, Liberty, Lipscomb, Llano, Loving, McCulloch, Mitchell, Nolan, Ochiltree, Pecos, Presidio, Reeves, Runnels, Scurry, San Jacinto, Stonewall, Taylor, Tom Green, Upton, Walker, Waller, Ward, Wharton, Wichita, Wilson, and Wilbarger, being estimated at about one million six hundred and seven thousand five hundred and thirteen (1,607,513) acres.

3. All land — property of every kind and description covered by the Waco Northwestern consolidated mortgage, dated May 1st, 1875, executed to the Farmer-' Loan and Trust Company, which were not subject to the Waco and Northwestern first mortgage, which said property includes about four thousand two hundred and forty (4,240) acres of land per mile of said Waco and Northwestern division, saving and excepting such portions of said land as have been theretofore and prior to May 4, 1888, sold to other purchasers, and including all notes given to secure the credit portion of the price of land sales, the amount of such lands so conveyed, which are situated in the counties of Hansford, Howard, Glasscock, Kent, Mitchell, Tom Green, Ward, and Loving, being estimated at about one hundred and seventy-six thousand nine hundred (176,900) acres.

4. All the lands and property of every kind and description covered by the income and indemnity mortgage, dated May 7, 1877, and the general mortgage, dated April 1, 1881, or either of them which were not subject to either main-line first mortgage, or the Western Division first mortgage, or the Waco and Northwestern Division first mortgage, or the main-line and Western Division consolidated mortgage, or the Waco and Northwestern Division

consolidated first mortgage, saving and excepting such portions of said lands as had been, prior to May 4th, 1888, sold to other purchasers, and including all notes given to secure the credit portion of the price of land sale, the property so conveyed being situated
22 in the counties of Bastrop, Brazos, Brown, Bee, Collin, Caldwell, Dallas, Ellis, Fayette, Freestone, Falls, Grayson, Grimes, Gonzales, Harris, Lee, McLennan, Johnson, Kaufman, Limestone, Milam, Navarro, Robertson, Travis, Washington, Waller, and Wharton, and estimated to include about fifteen thousand six hundred and thirteen (15,613) acres of land, and also a large number of town lots situated in the following towns: City of Houston, Harris county; town of Hempstead, Waller county; towns of Courtney and Navasota, Grimes county; towns of Millican, Wellbourn, Bryan, and Benhley, in Brazoria county; towns of Calvert, Hearne, and Bremond, in Robertson county; towns of Kosse, Thornton, Groesbeck, and Mexia, in Limestone county; town of Wortham, in Freestone county; towns of Corsicana and Richland, in Navarro county; town of Rice, in Navarro and Ellis counties; towns of Ennis, Palmer, and Ferris, in Ellis county; towns of Hutchins, Dallas, and Richardson, in Dallas county; towns of Plano, Allen, McKinney, Melissa, Anna, and Van Alstyne, in Collin; towns of Howe, Sherman and Denison, in Grayson county; towns of Marlin and Reagan, in Falls county; towns of Waco and Ross, in McLennan county; town of Burton, in Washington; town of Ledbetter, in Fayette and Washington county; town of Giddings, in Lee county; towns of Paige and Elgin, in Bastrop county, and the town of Manor and city of Austin, in Travis county.

5. All the rights, title, and interest at law or in equity of the Houston and Texas Central Railway Company to all the lands and town lots on said 4th day of May, 1888, standing or originally standing of record in the name of A. Groesbeck and others, trustees, in the counties of Bastrop, Brazos, Brown, Collin, Caldwell, Dallas, Ellis, Fayette, Freestone, Falls, Grayson, Gonzales, Johnson, Kaufman, Limestone, Lee, McLennan, Navarro, Robertson, Washington, and Wharton, the said town lots situated as stated in the preceding
23 paragraph marked "4th."

The property so conveyed, including all the lands, lots, and properties, being particularly described in certain schedules recorded in each of the counties above named, designating the land situated in each county covered and conveyed by each of the mortgages above described to the various trustees thereof (save and except those lands already sold prior to May 4th, 1888), and also particularly described in certain other schedules on file with the clerk of the circuit court of the United States at Galveston as part of the record in said consolidated cause No. 198, and which said schedules are referred to as a part hereof in like manner as if at length herein transcribed.

That under and in execution of said decree your defendant, Dillingham, as special master commissioner, duly appointed by said honorable circuit court, did make and deliver a deed to your defendant, Olcott, selling and conveying said lands and other prop-

erties aforesaid to him, said Olcott, and that said Houston and Texas Central Railway Company did, in obedience to the terms of said decree and as a further assurance to the purchaser, intervene and join in said deed by A. C. Hutchinson, its president; which said deed has been duly recorded in all counties in the State of Texas where the same is required to be recorded in manner and form required by law.

That said circuit court of the United States is and was a court of competent jurisdiction in the premises.

V.

That by virtue of the purchase of said property by said Olcott, one of the defendants herein, at the sale aforesaid and by reason of the facts herein alleged said Olcott became vested with a full, free, and unencumbered title in and to all the property purchased by him at said sale and herein described, and that the land
24 claimed by plaintiff forms part of the land so purchased by said Olcott and which before his said purchase belonged to said railway company and form part of the lands acquired by said railway company by grant from the State of Texas, as hereinafter fully set forth.

That he has not parted with any part of his said purchase save and except the railroad and the lands forming part of the right of way or being appurtenant to or used in connection with the operation of said railway, and that he is still the owner in fee-simple of the remainder of said property so conveyed to him, including the property herein claimed by plaintiff.

VI.

The Houston and Texas Central Railway Company was chartered by an act of the legislature of Texas approved March 11, 1848, entitled "An act to establish the Galveston and Red River Railroad Company."

By the terms of this act the company chartered was invested with authority of constructing a railway from Galveston bay or its contiguous waters to a point on Red river. (See special act of 1848, page 370.) By the terms of an act supplementary to the act to establish the Galveston and Red River Railway Company," approved February 7, 1853, defendant company was authorized to build its road to the city of Austin.

By special act of the legislature passed February 11, 1852, entitled "An act supplemental to an act to establish the Galveston and Red River Railroad Company" (see Special Laws of 1852, page 142), and especially by the 14th section of said act, there was granted said railroad company by the State eight sections of land of 640 acres each for every mile of railway actually completed by it and ready for use, and said section also prescribed the manner by which land certificates should be issued, surveys made, and made
25 it the duty of the commissioner of the land office to issue patents to said company in its corporate name upon the re-

turn of the field-notes of any survey made by virtue of the certificate issued as contemplated by this section.

By subsequent act of the legislature, as before stated, passed September 1, 1856, the name of the organization known as the Galveston and Red River R. R. Co. was changed to that of the Houston and Texas Central Railway Company.

Subsequent to the act of the legislature of 1852 making a special grant to the Galveston and Red River R. R. Co. of eight sections of land of 640 acres each for each mile of completed road the legislature of Texas by general act passed a law entitled "An act to encourage the construction of railroads in Texas by donation of lands." Section 1 of this act provided that any railroad company chartered by the legislature of the State heretofore or hereafter constructing within the limits of Texas a section of twenty-five miles or more of railroad should be entitled to receive from the State a grant of sixteen sections of land for every mile of road so constructed and put in running order.

After providing the manner in which the road should be constructed, the manner in which the same should be inspected, the manner in which surveys should be made, it was prescribed by section 6 of said act that any railroad company having completed and put in running order a section of twenty-five miles or more of its road may give notice of the same to the governor, whose duty it shall be to appoint some skilful engineer (if there be no State engineer) to examine said section of the road, and if, upon the report of said engineer under oath, it should appear that said road had been constructed in accordance with the provisions of its charter and such general law of the State in force at the time regulating railroads, thereupon it shall be the duty of the commissioner
26 of the general land office to issue to said company patents for the odd sections of surveys in pursuance of the provisions of this act.

By the twelfth section of said act it was prescribed that the provision of the same should not extend to any company receiving from the State a grant of more than sixteen sections of land, nor to any company for more than a single-track road, with the necessary turnouts.

In 1855 the Houston and Texas Central Railway Company commenced the construction of its road from the city of Houston in a northerly direction to its present terminus on the Red river.

The legislature of Texas, by a number of acts, both general and special, extended to the Houston and Texas Central Railway Company all the rights and privileges granted to railroad companies generally of the land grants contemplated by the act of Jan. 30th, 1854.

By the act of the legislature approved Jan. 30th, 1854, it was prescribed that the provisions of the acts should not apply for any work not done within ten years after its passage; or, in other words, limited the operation of the law until Jan. 30th, 1864.

VII.

At the breaking out of the war between the Confederate States and the United States of America said railway company had constructed a line of its railway from its southern terminus in the city of Houston to the town of Millican, in Brazos county, a distance of about eighty miles; that during the war as aforesaid, and owing to the interruption occasioned thereby, the legislature of the State of Texas passed two several acts, one entitled "An act for the relief of companies incorporated for the purposes of internal improvement,
by allowing them further time for performance on account of
27 the pending war," and the second entitled "An act for the relief of railroad companies."

The first-mentioned act provided that the time of the continuance of the then existing war between the Confederate States and the United States of America should not be computed against any internal improvement company in reckoning the period allowed them in their charter by any law, general or special, for the completion of any work contracted by them to do.

In the second act above referred to it was provided that the failure of any chartered railroad company in this State to complete any section or fraction of a section of its road, as required by existing laws, should not operate as a forfeiture of its charter or of the lands to which said company would be entitled under provisions of an act entitled "An act to encourage the construction of railroads in Texas by donation of land," approved January 30, 1854, and the several acts supplemental thereto, provided said company should complete such section or fraction of a section as will entitle it to donations of land under existing laws within the two years after the close of the war between the Confederate States and the United States of America.

It was provided in the second section of said first-mentioned act and the fourth section of said last-mentioned act substantially as follows:

"That the lands to which any such company may now be entitled in pursuance of this act may be designated, surveyed, and patented at any time within two years after the passage of this act, and the president and directors of the Houston and Texas Central Railway Company shall, before the provisions of this act shall extend to the benefit of said company, pass a resolution restoring the original
bona fide stockholders of said company, those who have paid
28 for stock, to all the rights, privileges, and immunities to which they were entitled previous to and of which they were divested by the sale of said road to W. J. Hutchins and others, and shall forward to the governor of the State a copy of said resolution, signed by the president and countersigned by the secretary or treasurer, under the seal of said company, and said company shall not have the power to repeal said resolution so as to defeat the object of this act: Provided, that if the said original *bona fide* stockholders should fail to pay into the treasury of said company 10 % upon their said stock on or before the expiration of the extension of

time provided in this act for railroad companies to fulfill that charter obligation to the State, then and in that case said stockholders shall forfeit all their rights, privileges, and property interests as stockholders in said road."

VIII.

That in pursuance of the provisions of said act the Houston and Texas Central Railway Company, acting by its board of directors, passed a resolution on the 25th day of November, 1862, by which the original *bona fide* stockholders of said company were restored to their rights upon the payment of the ten per cent. as provided in said resolution.

That the said resolution was in all respects prepared, passed, and adopted as *were* required to be done by the provisions of said aforesaid act, and the rights of such stockholders who paid ten per cent. of the par value of their stock were recognized and their stock treated as valid, and all who wished to do so voted at subsequent meetings.

That the books of the said Houston and Texas Central Railway Company show that the holders of 7,736 shares of said stock accepted the conditions and paid the ten per cent.

29 IX.

By the terms of an act passed on the 13th day of November, 1866, entitled "An act for the benefit of railway companies," the legislature authorized a grant of sixteen sections of land to the mile to railway companies heretofore or hereafter constructing railroads in Texas, under the same restrictions and limitations theretofore provided, for ten years after the passage of the act.

X.

That by virtue of and in pursuance with the laws hereinafter stated and the charter of said railway company and by virtue of an act of the legislature entitled "An act for the relief of the Houston and Texas Central Railway Company," passed on the 15th day of August, 1870, there *was* issued to the Houston and Texas Central Railway Company the land certificates which authorized it, the said company, to locate and survey all the lands hereinbefore described.

That the certificates were issued to said company by virtue of and in pursuance with said laws which granted lands to railway companies for sidings or turnouts as well as for main line of road; that the law of January 30, 1854, provided that "Any railroad company chartered by the legislature of this State heretofore or hereafter constructing within the limits of Texas a section twenty-five (25) miles or more of railroad shall be entitled to receive from the State a grant of sixteen sections of land for every mile of road so constructed and put in running order," and the 12th section thereof contained the following language: "The provisions of this act shall not extend to any company for more than a single-track road with the necessary turnouts."

XI.

That during the administration of Governor Pease, who
30 was governor when the law of 1854 was passed, and on down through all the administrations of the several governors of Texas, engineers were appointed by them to inspect the completed roads from time to time, and made to the respective governors their reports thereupon, showing the measurement and constructions, equipment, &c., of said railroads, and showing, among other things, particularly in their reports the number of miles of main line and side tracks. The said reports were examined and approved by the governor, and the Commissioners of the General Land Office issued certificates and in many cases patents for land for both sides and main tracks, and in most cases not separating the quality for main line for the quality for sidings up to and until the change of the law by the act of August 16, 1876.

That under all the said laws prior to 1876 the executive officers of the State interpreted the laws as entitling the Houston and Texas Central Railway Company, as well as all other roads similarly situated, to grants of land for the main line of its completed railway, as well as for building and constructing its necessary side tracks and turnouts.

XII.

That the Houston and Texas Central Railway Company completed and constructed its entire road by virtue of its charter and the general and special laws passed by the legislature of the State of Texas, and became entitled to said land grants and certificates aforesaid; has spent large sums of money in the work of surveying the lands and locating and equipping its said road, and paid to the State of Texas large sums of money as taxes, which the State has received annually on the lands.

That none of defendant's lands were located and surveyed later than in 1874.

31 XIII.

That the lands granted to said railway company and herein described and as acquired by said Olcott from said railway company were located by virtue of certificates granted to it under the laws aforesaid, some of which have been patented and others not patented; that the said lands have been surveyed in all respects as the law requires land to be surveyed for railway companies by virtue of grants of land—that is to say, into tracts of 640 acres each—and an equal amount located, surveyed, and returned for the benefit of the school fund; that the field-notes thereof were duly recorded, and are now in the proper surveyor's district; that the maps and plats and plants and sketches thereof were duly made, which, with the field-notes and certificates, have been duly returned at the general land office of the State of Texas within the time required by law, and have remained on file in the general land office ever since; that the same were duly platted upon the maps of the general land

office of the State of Texas, suitably marked as lands of the Houston and Texas Central Railway Company; that the maps of same are in use in the land office of the State of Texas now, and the odd sections are recognized as Houston and Texas Central Railway Company's land, and maps thereof have been furnished to the county surveyors of the counties named, and are now in their possession and control, showing said lands platted thereon and recognized by the State of Texas through her officers as the land of the said Houston and Texas Central Railway Company.

XIV.

And, further answering, defendants say that by virtue of the charter and amendments of the defendant railway company and by virtue of the laws of the State of Texas, general and special,
32 in force at the time, that defendant company was entitled to each and all of the certificates issued to it by the State of Texas and her officers for the construction and completion of that portion of the H. & T. C. R'y extending from Brenham, in Washington county, to Austin, in Travis county, Texas; that in accordance with such laws in force as aforesaid and the charter of the said railway company the H. & T. C. R'y Co. made application to the governor, stating that it had completed and put in running order ninety-three miles or three sections of twenty-five miles each, and eighteen miles of road, requesting the governor of the State of Texas to instruct an engineer to examine the same and report, etc., and that the governor thereupon appointed an engineer to examine said road and report as required by law; that the engineer examined the said road and under oath to the governor reported, among other things in his report, as follows: "It affords me pleasure to certify that for the 96 and $\frac{407}{1453}$ miles of road inspected the Houston and Texas Central Railway Company has complied with the provisions of its charter and of the general laws of the State of Texas relative to the construction of railroads."

Upon which report and action of said governor the said certificates were delivered and the said lands surveyed for the H. & T. C. R'y Co. and field-notes recorded and returned, together with sketches and maps thereof, to the general land office, where the same have remained ever since, and recognized and treated by the officials and the public as the lands of the H. & T. C. R'y Co. alone.

Defendants say further that such of said surveys sued for as are located in what is known as the "Pacific reservation" were located by virtue of a valid and lawful file made through Bexar county land district, bearing date July 28th, 1872, prior to the law creating said reservation, and defendants' rights are in nowise affected
33 by said reservation; that said law, entitled "An act to adjust and define the rights of the Texas and Pacific Railway Company with the State of Texas in order to encourage the speedy construction of a railway through the State to the Pacific Ocean," so far as the same interferes with defendants' rights herein, *or* null and void.

XV.

Defendants aver that the decision of the governor of the State of Texas that the said Houston and Texas Central Railway Company had done and performed the conditions precedent to its right to said lands and all necessary antecedent acts before the issue to said company of certificates for said land was and is conclusive against the State, and that said governor is and was by the various legislative acts hereinbefore alleged constituted the sole and final judge whether or not said antecedent acts have been performed, and that the title vested in said railway company by the certificates of the commissioner of the general land office and surveys thereunder, pursuant to the findings and decisions of the governor of the State of Texas, vested a full and perfect title to said lands in said railway company, which title has been legally acquired by your defendant, Olcott, as aforesaid.

Defendants further aver that they are informed and believe that the supreme court of the State of Texas, the highest court known to the laws of said State, has by two decisions construed said act of January 30th, 1854, and the several acts amendatory thereof, especially the acts of January 11, 1862, and the act of November 13, 1866, and also the effect of said acts upon the charters of railroad companies incorporated by the legislature of 1866, wherein the said railway companies were granted lands under the act of January 30, 1854.

That the first of said decisions of the supreme court of Texas was made in 1872 in the case of The Houston and Great
34 Northern Railroad Company *vs.* Jacob Kuechler, commissioner of the general land office, reported in the 36 vol. of Texas Reports, p. 383. In said case it was held that the act of January 30, 1854, was in force on November 5, 1868, and also on the 13th of November, 1866, when the grant made by the law of 1854 was extended for ten years; and it was further held that the charter of a railway company was a contract between the State of Texas and the incorporators, entitling the railway company to the benefit of the act of January 30, 1854, upon its compliance with the requirements of that act and of its charter, and that the 6th section of the 10th article of the constitution of the State of Texas of the year 1869, which prohibited the granting of land and the issuance of land certificates except to actual settlers, was prospective only and did not affect rights to land acquired by railroad companies under laws in effect previous to that date or at any other time. It was further held that, in view of the force to be given to the acts of 1862 hereinbefore referred to and by analogy to the provisions of the said constitution of 1869 suspending the statute of limitations, the time which elapsed between the 2nd of March, 1867 (when the first reconstruction laws of Congress were enacted), and the 30th of March, 1870 (when the State constitution of 1870 was accepted by Congress), is not to be computed against any individual or corporation to cut down any civil rights.

The other case wherein the supreme court of the State of Texas

construed said laws was in the case of The Galveston, Harrisburg and San Antonio Railway Company against The State of Texas, decided June 27th, 1891, and reported in the 81st volume of Texas Reports, p. 573. In said case the point was raised and submitted to the court for adjudication that the act of 1876, touching grants of land to railroad companies, was similar in its general effect to the
35 act of January 30, 1854. In determining this point the court called particular attention to the difference between the language used in the two acts, but makes use of the following language:

"But it must be borne in mind that prior to 1876 the certificates were issued and grants of land made to the railway companies by virtue of the act of January 30, 1854. Pasch. Dig., art. 4945 *et seq.* The first section of that act reads as follows: 'Any railroad company chartered by the legislature of this State heretofore or hereafter constructing within the limits of Texas a section of twenty-five miles or more of railway shall be entitled to receive from the State a grant of sixteen sections of land for every mile of road so constructed and put in running order.' It must be conceded, we think, that this language, in so far as the question before us is concerned, is substantially the same as that contained in the granting clauses of the act under consideration, but the 12th section of the act of 1854 contained the following language: 'The provisions of this act shall not extend * * * to any company for more than a single-track road, with necessary turnouts.' This provision is not contained in the act of August 16, 1876. Its meaning is not clear to our minds. Whether it was intended to be merely descriptive of the railways which should be empowered to receive the grants or whether it was intended to grant lands for the sidings we are not called upon to decide. It must be conceded, however, that it admits of the latter construction and affords a reason for the interpretation placed upon the act by the executive officers of the State, which without it would not be apparent to our minds. The construction of this act, therefore, does not aid us in construing the latter statute. The omission from the latter act of the language quoted does not tend to support the construction claimed by appellant. The failure to insert it, if entitled to any weight, tends
36 rather to the opposite conclusion. It may have been omitted with a view to deny the right to receive lands for the turnouts."

Now, defendants aver that by reason of the said decisions of the supreme court of the State of Texas, and also by reason of the decision of the Supreme Court of the United States in the case of Davis *v.* Gray, reported in 16 Wallace, p. 203, and by reason of the charters and laws of the State of Texas touching the grant of land to railroad companies; by reason of the construction placed upon the same by the executive officers of said State as aforesaid; by reason of the construction placed upon the laws by fifteen successive legislatures of the State of Texas, which have through a period of thirty years acted upon the construction of the law of 1854 given to said law by the governor of the State in 1856, when application was

first made for certificates for the length of both main line and necessary turnouts; by reason of the fact that the executive department, the one entrusted with the immediate administration of the land system of the State, has uniformly concurred in said construction, and that the same has been approved by successive governors of the State; by reason of the facts aforesaid said construction contemporaneous with the acts successively concurred in for more than thirty years by the executive, judicial, and legislative departments makes the construction placed upon said charters and laws a rule of property upon which your defendant, Olcott, has become vested with a title in fee-simple; that the construction so placed upon said laws and said rule of property has become a property right of your defendant, and that his deprivation of his property, through a new rule and through a new construction of said charter and laws, would be taken of his property without due process of law and would constitute an impairment of the contract entered into between said State and said railroad company through the charter and
37 legislation aforesaid, all in violation of the 10th section of the first article of the Constitution of the United States, which provides "that no State shall pass any law impairing the obligation of contracts," and in violation of the 14th article of the amendments of said Constitution, which provides "that no State shall deprive any person of life, liberty, or property without due process of law" and that the said laws of the State of Texas hereinabove set forth, if construed in the manner contended for by said plaintiff, are violative of the said provisions of the said Constitution, and are therefore null and void.

XVI.

Defendants further aver that, by reason of the construction placed upon the said acts by all the departments of the State government as aforesaid and by reason of the said grants of land to the said Houston and Texas Central Railway Company, said railway company was given credit in the money markets of the world, and was enabled to raise and procure money for the purpose of constructing and extending its said railway by mortgages of said lands and of its other property duly authorized by said legislation of the State of Texas; that said lands formed a most important element in the credit originally obtained by said Houston and Texas Central Railway Company as the basis of floating its bonds; that said bonds were secured by deeds of trust, under foreclosure of which defendant Olcott acquired said lands.

That during more than twenty years the State of Texas and her officials have stood by and allowed the assertion of title by said Houston and Texas Central Railway Company in and to said lands, whereby credit was obtained as aforesaid, and that said State and said officials are therefore now estopped by their laches from setting up any title in and to said lands, and that plaintiff's de-
38 mand is a stale demand, and that your defendants especially plead laches, stale demand, and estoppel in bar of the claims so set up by said plaintiff.

XVII.

Defendants, further answering, say that if this honorable court should hold that any of the land claimed by plaintiff in this cause were granted to said railway company for sidings or turnouts, and that said lands should, therefore, or for any other reason whereso-ever not have been located under the certificates under which the same were located, nevertheless that said railway company was at all times prior to said sale of September 8, 1888, entitled to said lands, for this, to wit:

That said railway company was upon said day and at all times prior thereto in possession of a large number of valid certificates, under which it never acquired any lands or under which lands were located, which locations have subsequently been ascertained to be null and void, and that said company was upon said 8th day of September, 1888, and at all times prior thereto entitled, upon a proper accounting with the State, to have located any of its certificates unlocated upon any lands acquired by it for sidings or otherwise under voidable locations or certificates.

That your defendant, Olcott, holds under such Houston and Texas Central Railway Company, and that the only remedy of the State, if any she has, is in a proper equity proceeding to come to an accounting with said railway company to ascertain whether or not said railway company has acquired a greater number of the acres of land in all from the State of Texas than it was entitled so to acquire under certificates issued to it, and against which no objection or defence whatsoever exists.

XVIII.

That said Houston and Texas Central Railway Company
39 and all its lands, franchises, and property of every nature and description whatsoever were at the time of the institution of said suits against it and long prior thereto and ever since have been and still are in the possession of the honorable the United States circuit court for the eastern district of Texas, through its receivers; that the same were placed in the hands of Charles Dillingham, Nelson S. Easton, and James Rintoul, as joint receivers, by virtue of an order and decree made on May 26, 1896, in consolidated cause No. 198 of the equity docket of said court, entitled Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, *vs.* The Houston and Texas Central Railway Company *et als.*, now pending; which said order was modified and superseded by another order of date December 7, 1888, relieving said Easton and Rintoul from further duty as receivers in said cause and continuing said Charles Dillingham as sole receiver, which said order was in the words and figures following, to wit:

"This cause came on to be heard at this term on the application of Frederick P. Olcott *et al.* to relieve Nelson S. Easton and James Rintoul from further duty as receivers herein and for other purposes, and was argued by counsel. Whereupon and on consider-

ation thereof it is ordered, adjudged, and decreed that Nelson S. Easton and James Rintoul, two of the joint receivers herein, be, and the same are hereby, relieved from any further duty as joint receivers in this cause, and that said Easton and Rintoul do pass their accounts to date before John C. Winter, special master in chancery herein. It is further ordered, adjudged, and decreed that Charles Dillingham, the other of the joint receivers hereinbefore appointed, be, and he is hereby, continued as *also* receiver in this cause, with all the powers, rights, duties, and obligations now resident in him as joint receiver and heretofore established by
40 the orders herein entered appointing him and said Nelson S. Easton and James Rintoul joint receivers. It is further ordered, adjudged, and decreed that all rights, claims, and demands arising against the said joint receivers during their administration shall be prosecuted against the said Charles Dillingham alone, and that the said Charles Dillingham shall alone have the right to prosecute and defend all rights, claims, and demands of every kind and nature arising in behalf — or against the said joint receivers or in behalf of or against the Houston and Texas Central Railway Company, and to prosecute or defend any rights, claims, or demands or action at law or in equity which the said joint receivers might have prosecuted or defended under the order of this court. It is further ordered, adjudged, and decreed that the said Charles Dillingham, during his sole receivership herein and until the property in his possession shall be delivered to the respective purchasers, Frederick P. Olcott and George E. Downs, shall have power and authority to collect for account of the parties in interest the land notes in his possession as sole receiver, and, on payment to him of said notes, to execute releases of the mortgages securing said notes on the land sold, and that he shall further have the power to make sale of and deeds for the land in his possession heretofore sold to said purchasers, Olcott and Downs, with the direction, however, to report all such sales before deeds are given to the said Frederick P. Olcott of the lands bought by him, and to George E. Downs and the Farmers' Loan and Trust Company, trustee, of the lands bought by said George E. Downs, with the right in said Frederick P. Olcott and the said George E. Downs respectively to prevent any such sales by timely objection thereto, it being specially understood that no sale of land bought by said Downs and covered by the mortgage of the Farmers' Loan and Trust Company, as trustee of the first mortgage on the Waco and Northwestern division, shall be made
41 free of said mortgage except by and with the consent and deed of said Farmers' Loan and Trust Company, trustee as aforesaid."

That under and by virtue of said order said Easton and Rintoul were relieved and said receivership extended and continued with your defendant, Charles Dillingham, as sole receiver thereof, with power to sue and defend all suits in respect to the property of the Houston and Texas Central Railway Company until the same be turned over to the purchaser thereof, or he be relieved of his trust as such receiver.

That said property is still in his hands as the receiver thereof, and that he has not been relieved of his said trust; that said honorable circuit court, therefore, has exclusive jurisdiction to decide upon conflicting claims to the ultimate possession and control of said property, and that this suit was filed without leave of said honorable circuit court, and that this honorable court is therefore without jurisdiction in the premises *ratione materiæ*.

XIX.

Defendants further aver that any pretended claim, interest, or title urged and set up by said plaintiff in and to any of the lands aforesaid are utterly false and untrue; that the title of your defendant to said properties so acquired by him from said Houston and Texas Central Railway Company, under said decree of said United States circuit court, was and is a full, free, and unencumbered title in fee-simple.

XX.

That this cause is one arising under the Constitution and laws of the United States, and that the property claimed by plaintiff largely exceeds five thousand ($5,000) dollars in value.

42 XXI.

Defendants further represent that the Houston and Texas Central Railway Company expended large sums of money in the work of surveying, locating, and equipping its said road, as aforesaid, and that it paid the taxes thereon up to the time when Charles Dillingham was appointed receiver thereof, in 1885, and the said Charles Dillingham after his appointment as such receiver for the said Houston and Texas Central Railway Company paid the taxes thereon from said time up to the present time, together *upon* all other lands of the Houston and Texas Central Railway Company granted by the State of Texas, which amount of taxes the State of Texas has never made provision to pay nor tendered or offered to return the same or any part thereof.

That it cost the railway company twenty-five dollars per section to survey the land sued for herein, which amounted to the aggregate sum of four hundred dollars, and it cost the further sum of —— dollars per section to correct the surveys, amounting in the aggregate *of* the further sum of —— dollars.

That the said Houston and Texas Central Railway Company and the said Charles Dillingham, receiver thereof, and the said F. P. Olcott have paid in taxes, for surveying the land and correcting the surveys, and in patent fees, for the entire issue of certificates, the sum of —— dollars, and in addition have paid other large sums of money for the care, custody, and control of such land.

Said defendants say that the prayer of the State for the recovery of said land ought not to be heard and considered until the State of Texas return or offers to return the sums of money so paid out and expended, as aforesaid, and the defendants plead the same in bar of the further prosecution of this suit.

43

XXII.

If the court should believe that it had no power to extend the relief to the defendants herein prayed, and refuses to require the State to refund the money as paid out in taxes, betterments, &c., then these defendants pray the court to fix, establish, and impose some equitable terms upon the plaintiff in administering the relief sought, and make a full compliance with them a condition precedent to its enjoyment.

XXIII.

Further answering in this behalf, defendants sayeth that neither of them have been in possession of said property, but that the possession of said lands since the beginning of said receivership have continuously been in Charles Dillingham, the receiver thereof, under and by virtue of the orders and decrees of said United States circuit court, as aforesaid.

Wherefore, defendants, having fully answered so much of plaintiff's petition as they are advised it is necessary to do, ask to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained, and defendants further pray:

1. That it may please your honor to declare and decree *that* the location and survey so as aforesaid made by the Houston and Texas Central Railway Company *made* of the lands described in Nolan county, Texas, segregated from the mass of the public domain and caused to become the property of the Houston and Texas Central Railway Company, free from any and all claims on the part of the State of Texas, and that the said railway company thereby acquired a good and valid title thereto.

2. That it may please your honor to adjudge and decree that under and by virtue of the said sale of September 8, 1888, said F. P.
44 Olcott acquired a fee-simple and unencumbered title to said land herein sued for from said railway company, free from any claim of said State of Texas.

3. Defendants further pray that if they have not asked for appropriate relief that they have such further orders and decrees as may be necessary and proper in the premises to secure to them their rights, for special and general relief, and for all their costs in this behalf expended.

T. D. COBBS,
Attorney for Defendant.

Endorsed as follows, to wit:
No. 269. State of Texas *vs.* F. P. Olcott *et al.* District court of Nolan county. Defendants' second amendment to original answer. Filed March 30th, 1893. John C. Cox, clerk district court, Nolan county, Texas.

Disclaimer of Geo. E. Downs.

Filed Apr. 11, 1890.

In the District Court of Nolan County, Texas.

THE STATE OF TEXAS
vs.
H. & T. C. R'Y Co. *et al.*

And now comes George E. Downs, one of the defendants herein, and says that at no time before or since the institution of this suit was this defendant in possession of the land or any part thereof sued for, and this defendant saith that he has no interest in or claim to said land sued for, and here now enters his disclaimer.

T. D. COBBS,
Attorney for Defendant.

Endorsed as follows, to wit:

Disclaimer of George E. Downs. Filed April 11th, 1890. John C. Cox, clerk district court, Nolan Co., Tex.

45 *Conclusions of Fact and Law.*

Filed April 19, 1893.

In District Court, Nolan County, March Term, A. D. 1893.

THE STATE OF TEXAS
vs.
H. & T. C. R'Y Co., FRED. P. OLCOTT, & GEO. E. DOWNS. } No. 269.

This is a suit by the State, through its att'y general, J. S. Hogg, against the Houston & Texas Central Railway Company, Fred. P. Olcott, and George E. Downs to recover sixteen sections of land, each containing six hundred and forty acres, situated in Nolan county; suit filed February 3, 1890. George E. Downs files a disclaimer.

The court finds the following facts, viz:

1. That a special act was passed by the legislature of the State of Texas, approved March 11, 1848, incorporating the Galveston & Red River Railway Company. By said act said company was authorized to construct a railroad from a point on Galveston bay or its contiguous waters to a point on Red river, with the privilege of constructing and maintaining branches. There was no land grant coupled with this act of incorporation.

2. That a special act was passed by the legislature, approved February 14th, 1852, supplementary to the above act, in which it was provided that 8 sections of land of 640 acres each should be granted to said company for every mile of railroad actually completed and ready for use.

3. That a special act was passed by the legislature, approved

January 23rd, 1856, supplementary to the several acts incorporating said company, in which it was provided that if said company completed its first 25 miles of road, commencing at the city of Houston, within six months after January 30th, 1856, its failure to complete any portion of its said road before said date should not operate as a forfeiture of any of its rights, and the said company would then be entitled to the rights, benefits, and privileges
46 granted by an act approved January 30th, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of land," and it was further provided in said special act "that nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30th, 1854." By this special act also the said company was authorized to issue bonds and to mortgage all of its property.

4. That by virtue of a special act of the legislature approved September 1st, 1856, the name of the company was changed to the "Houston & Texas Central Railway Company."

5. That a special act was passed by the legislature and approved February 4th, 1858, providing that the failure of the Houston & Texas Company to complete the third section of 25 miles of its road by the 30th of July, 1858, should not work a discontinuance of the benefits conferred by any general laws of the State of Texas in reference to railroads, provided the third section should be completed by July 30th, 1859. This act contains a proviso "that the benefits of the provisions of any general law shall only accrue to the said railroad company whilst said law shall remain in force."

6. That on the 25th day of November, 1862, the said railway company, by its board of directors, passed a resolution by which the original *bona fide* stockholders of said company would be restored to their rights in said company upon the payment into the treasury of said company of 10 % upon their said stock in accordance with the provisions of the acts of the 11th day of January, 1862; that under and by virtue of said resolution said stockholders were accorded all rights contemplated by said law, and many stockholders took advantage thereof. A copy of said resolution was never forwarded to the governor of Texas.

7. That a special act was passed by the legislature and approved September 21st, 1866, which provided, among other things,
47 that the said Houston & Texas Central Railway Company shall construct and put in running order a section of 25 miles of additional road to that now built within one year from January 1st, 1867, or fifty miles within two years from that date, and such grant of land (16 sections to the mile granted in the act) shall be discontinued when said company shall fail to construct and complete at least 25 miles of the road contemplated by their charter each year after the construction of said first-mentioned fifty miles of road, provided that said road shall be put in running order to Bryan station and cars running regularly thereon by the 1st day of September, 1867. This and the other special acts granting lands to said railway company provided the manner of procedure by which it could procure certificates for the land due to it.

8. That a special act of the legislature of date August, 1870, provides that "No forfeiture of any of the rights or privileges secured to it by existing laws shall be enforced against the said Houston & Texas Central Railway Company by reason of its failure to comply with the conditions as to construction imposed by the 1st section of the act of the 21st of September, 1866, entitled 'An act granting lands to the Houston & Texas Central Railway Company,' but the said company shall have and enjoy all of the rights and privileges secured to it by existing laws the same as if the conditions embraced in the 1st section of said act of the 21st of September, 1866, had been in all respects complied with," with a proviso which was complied with.

9. That on the 1st day of January, 1865, the terminus of said railroad was at Millican, in Brazos county.

10. That the 4th section of 25 miles of said railroad, terminating at Bryan, was completed August 27th, 1867.

11. That the 5th section of 25 miles of said railroad was completed on or before June 15th, 1869.

48 12. That the 6th section was completed on or before August 17th, 1870.

13. That the 7th section was completed on or before July 15th, 1871.

14. That the 8th section was completed to Richland creek on the 26th of September, 1871.

15. That by an act of the legislature approved February 2, 1856, the Washington County Railroad Company was chartered for the purpose of constructing a railway from some point on the track of the Galveston & Red River R. R., crossing the Brazos river within the limits of Washington county, and then running in the most suitable direct line to Brenham, in said county. The said company was organized and constructed its road from Hempstead, in Waller county, to Brenham, in Washington county, a distance of about 25 miles.

16. That by the act of the legislature passed August 15th, 1870, the Washington County railroad was merged in and became a part of the Houston & Texas Central railway. This latter railway was authorized by said act to extend the Washington County railroad from Brenham to the city of Austin.

17. That the Houston & Texas Central railway received from the State of Texas 540 land-scrip certificates for 640 acres each, all of which have been located and surveyed on public domain; that each and all of these certificates, in which are included the ones involved in this suit, were issued for and upon that portion of defendant's line of railway extending from the city of Brenham to the city of Austin.

18. That the defendant's main line of track from Brenham to Austin mentioned in each of said certificates is $93\frac{33}{76}$ miles, and the sidings and switches at and between the same points *is* $2\frac{5}{6}$ miles.

19. That the land- described in plaintiff's petition were located and are now held without patents by the defendants, by

49 virtue of said certificates, according to the number and description set forth in said petition.

20. The sections of defendant's line of railway from Brenham to Austin were completed, respectively, 1st, on January 20, 1871; 2nd, on September 15th, 1871; 3rd, on November 26th, 1871, and 4th, completed to Austin on 25th of December, 1871.

21. That the defendants paid taxes on the land sued for continuously since they were located up to the present time.

22. That the defendants paid all fees of locating and surveying the lands sued for, as well as for the same number of alternate sections for the public free-school fund.

23. That the various engineers appointed by the different governors to inspect railroads, as the same were constructed, in their respective reports of inspection stated the number of miles and feet of main track, the number of miles or feet of sidings. The action of the respective governors, except Governor Roberts, on said reports was usually in the following words: "Report examined and approved," upon which reports and action of the governors the commissioners of the general land office issued to the respective companies certificates for main track and sidings in form such as is shown by the record during the administration of Governor Roberts. He approved for only the number of miles of main track stated in the report. In one instance Governor Davis approved a report of sidings exclusively, for which certificates were issued in usual amount per mile. This was done in one instance also by Governor Hubbard, for which certificates issued. Governor Hubbard on one of the reports endorsed: "This report of Inspector Gray examined and approved for 30 miles main track and sidings as being made, graded, and in all respects complying with the law."

24. That the lands sued for and described in plaintiff's petition are situated in Nolan county, Texas, in what is known as the Pacific reservation, created by special act of the legislature of date May 2, 1873, entitled "An act to adjust and define the rights of the Texas & Pacific Railway Company within the State of Texas, etc.," and the same were located and surveyed, 14 of them on June 1st, 1873, and 2 of them June 7th, 1873.

25. That the 16 certificates by virtue of which the land sued for was located were issued by the commissioners of the general land office on July 1st, 1872, after the road from Brenham to Austin had been completed and put in running order, and after John W. Glenn, civil engineer and commissioner for the State, had reported to the governor of the State that the Houston & Texas Central Railway Company had complied with the provisions of its charter and of the general laws of the State of Texas relating to the construction of railroads.

25. That since the location of said lands they have been platted upon the map in use at the general land office of the State of Texas and recognized by the land commissioners as the Houston & Texas Central Railway Company's lands.

That on the 26th day of May, 1886, in consolidated cause No. 198 of the equity docket of the circuit court of the United States for the eastern district of Texas, entitled "Nelson Easton & James Rintoul, trustees, and The Farmers' Loan & Trust Company, trustee, *vs.*

The Houston & Texas Central Railway Company *et al.*, Charles Dillingham, Nelson S. Easton, and James Rintoul were duly appointed receivers of all the lands, franchises, and property of every nature of said railway company.

That on December 7th, 1888, by an order of said circuit court said Easton and Rintoul were relieved from further duty as such receivers, and Charles Dillingham was continued as sole receiver until the property of said railway was turned over to the purchasers thereof.

51 That at a sale duly authorized by said circuit court, which took place in the city of Galveston on the 8th day of September, 1888, the defendant F. P. Olcott became the purchaser of the property of every kind and description of the Houston & Texas Central railway, including the lands in controversy.

That said receiver, Dillingham, duly executed to said F.P. Olcott a deed to said property, including the land in controversy.

That the Houston & Texas Central Railway Company, as a further assurance to the purchaser, intervened and joined in said deed by its duly authorized officer.

That said sale was duly confirmed by the court on the 8th day of January, 1889.

That the lands in controversy, as well as all other property of the railway, had been mortgaged by it, and the said sale was ordered for the purpose of paying off the mortgages.

Conclusions of Law.

1. That this suit having been brought for the sole purpose of determining the question of title to the lands in controversy between the State of Texas and the defendants, said railway company and Olcott, the same can be maintained for said purpose, notwithstanding the fact that said railway company and lands in controversy are still in the custody of a receiver appointed by the Federal court, and that this suit is brought without the permission of the Federal court.

2. That the sale of the lands in controversy to F. P. Olcott and the deed executed to him were effectual to convey to him all title and interest in and to said lands then owned by said railway company.

3. That the resolution passed on November 25th, 1862, by the board of directors of the Houston & Texas Central Railway

52 Company, restoring its stockholders to their rights, etc., was a substantial compliance with the requirements of the act of June 11th, 1862, and a failure to file a copy of said resolution with the governor would not deprive said company of the benefits of said act.

4. That under and by virtue of the special act approved January 23rd, 1856, the State had the right to repeal the act of January 30th, 1854, granting lands to railroads in so far as the same affected the Houston & Texas Central railway.

5. That the special act approved February 4th, 1858, in so far as

the same could be held to grant land to the Houston & Texas Central Railway Company, ceased to be operative at the time the act of January 30th, 1854, granting lands to railroads expired by limitation.

7. That the effect of the act approved January 11th, 1862, extended the operation and life of the act of January 30th, 1854, until two years after the close of the war, which was May 28th, 1865. This last-named act therefore expired by limitation on the 28th of May, 1867, unless kept in force by the act approved November 13th, 1866.

8. That the act approved November 13th, 1866, is in conflict with the constitution of 1866 and previous constitutions of the State, and is therefore null and void.

9. That the Houston & Texas Central railway cannot claim these lands under the special act of September 21st, 1866, granting 16 sections to the mile, for the reason that it failed to comply with the provisions of that act, that it should build fifty miles of road within two years from January 1st, 1867, and seventy-five miles within three years from that date. The company had therefore lost the right to earn land under that act.

10. That the act of August 15th, 1870, enacted after the adoption of the constitution of 1869, which repealed the act of Sep-
53 tember 30th, 1854, was in conflict with that constitution and therefore null and void.

11. That the defendant F. P. Olcott, having taken title under the certificates, no patents having been issued, is affected with notice of their invalidity under the constitution of 1869.

12. The foregoing conclusions render it unnecessary to determine whether the special law entitled "An act to adjust and define the rights of the Texas & Pacific Railway Company in the State of Texas in order to encourage the speedy construction of a railway through the State to the Pacific Ocean," approved May 2nd, 1873, is or is not constitutional.

13. Judgment will be rendered for the plaintiff for the land in controversy and for costs.

To which defendants except.

WM. KENNEDY,
Judge 32nd District.

Endorsed as follows, to wit:

Conclusions of fact and law. Filed April 19th, 1893. John C. Cox, clerk district court, Nolan county, Texas.

Judgment of the Court, April 19, 1893.

THE STATE OF TEXAS *vs.* HOUSTON & TEXAS CENTRAL RAILWAY Company, Fred. P. Olcott, & Geo. E. Downs.	No. 269. April 19, 1893. Judgment of Court.

On this the 19th day of April, 1893, this cause came on to be heard, and the plaintiff, The State of Texas, appearing by her att'y general, C. A. Culberson, and the defendants appearing by att'y, when came on to be heard the plea of the defendants to the juris-

diction of this court, and the same, having been submitted
54 and being duly considered, was overruled by the court; to which ruling the defendants except; and the plea of defendants that there was a want of necessary parties, and that Chas. Dillingham, as receiver of The H. & T. C. R'y Co., defendant, was a necessary party to this suit, and praying that the court abate this suit, and said plea being duly considered by the court, the same is in all things overruled; to which judgment the defendants except. Then came on to be heard the defendants' exceptions to plaintiff's original petition Nos. 1, 2, 3, & 4, and same being duly considered by the court, same are each in all things overruled; to which judgment the defendants except; whereupon came on to be heard the disclaimer filed by George E. Downs, one of the defendants in this suit, disclaiming title or right or possession to any of the lands sued for, and the court after considering same is of opinion that said George E. Downs should go hence without day and recover his cost in this behalf expended, and it is so ordered. Then this cause being called for trial on its merits, all parties, both plaintiff and defendants, having announced ready, when came said parties, by their attorneys, and submit the matters in controversy, as well of fact as of law, to the court, and the pleadings, evidence, and argument of counsel for all parties having been fully heard and understood by the court, it is the opinion of the court that the plaintiff, The State of Texas, should recover judgment. It is therefore ordered, adjudged, and decreed by the court that The State of Texas, plaintiff, do have and recover of the defendants The Houston & Texas Central Railway Company and Frederick P. Olcott the land, to wit, sixteen sections of land of 640 acres each, situated and lying in Nolan county, Texas, in that certain block of Houston & Texas Central Railway surveys known as block No. 64; all of which are more particularly described and designated by the following tabulated statement, showing block, survey, and certificate number
55 and number of acres and where located, to wit:

No. of certif.	Date of certif.	To whom issued.	Survey No.	Block No.	No. acres.	In what county located.
38/4438	7/1/1872	H. & T. C. ...	169	64	640	Nolan.
38/4443	"	"	191	"	"	"
40/4997	"	"	199	"	"	"
40/4998	"	"	201	"	"	"
40/4999	"	"	203	"	"	"
40/5001	"	"	207	"	"	"
40/5002	"	"	209	"	"	"
40/5003	"	"	211	"	"	"
40/5004	"	"	213	"	"	"
40/5005	"	"	215	"	"	"
40/5006	"	"	217	"	"	"
40/5019	"	"	243	"	"	"
40/5020	"	"	245	"	"	"
40/5021	"	"	247	"	"	"
40/5022	"	"	249	"	"	"
40/5023	"	"	251	"	"	"

It is further adjudged by the court that said plaintiff, The State of Texas, recover of said defendants the possession of said lands hereinbefore described, and that the said certificates upon and by virtue of which said lands were located by said defendant railway company, as hereinbefore described, are wholly void, and that same are hereby cancelled and held for naught, and that the cloud cast upon the title of plaintiff to aforesaid lands by the location and survey of said certificates is hereby removed, and that plaintiff recover of said defendants, jointly and severally, all costs in this behalf expended.

To which judgment the defendant excepts.

Defendants' Motion for a New Trial.

Filed April 19, 1893.

In the District Court of Nolan County, Texas.

THE STATE OF TEXAS
vs.
THE H. & T. C. R'Y CO. *et al.*

And now comes the defendants and pray this honorable court to grant a new trial in said cause for the following reasons:

56 I.

Because this court is wholly without jurisdiction and without the power to try said cause, and because it was shown by the evidence in this case that prior to the institution of said suit all the property of the said Houston & Texas Central Railway Company was in the hands of a receiver appointed by the United States circuit court, and that the receiver was in possession of the property, and that the plaintiff brought this suit in violation of the comity existing between courts of concurrent jurisdiction for this, that the said plaintiff did not ask the permission of the said United States circuit court for the eastern district of Texas for permission to institute said suit and the same was brought in utter disregard of the pending receivership.

II.

Because the court erred in not abating said suit for the want of necessary parties in this, that the evidence showed upon the plea of defendants that Charles Dillingham, as receiver of all the properties of the Houston & Texas Central Railway Company, was in possession of the land sued for by virtue of such orders and decrees, and the law requires suit to be instituted in trespass to try title against parties in possession of the property, and that said Dillingham was therefore a necessary and proper party to said suit.

III.

Because the court's findings of facts are contrary to the evidence introduced on said trial.

IV.

Because the conclusions of law in said case are not the law of said cause and each and all of same are erroneous.

57 V.

Because the judgment of the court is contrary to the law and contrary to the evidence.

Wherefore defendants ask the judgment of the court to be set aside and a new trial granted in this behalf.

T. D. COBBS,
Att'y for Defendants.

Endorsed as follows, to wit:

Defendants' motion for a new trial. Filed April 19th, 1893. J. C. Cox, cl'k dist. court, Nolan Co., Tex.

Order of Court Overruling Motion for New Trial.

STATE OF TEXAS
vs.
H. & T. C. R'Y CO., FRED. P. OLCOTT, *et al.* } No. 269.

APRIL 19TH, 1893.

On this the 19th day of April, 1893, came on to be heard defendants' motion to set aside the decree of the court rendered in this cause on this date and to grant to defendants a new trial, both parties appearing by attorneys, and the court, having heard and considered said motion, as well as argument of counsel, is of the opinion that the law is against said motion. It is therefore ordered, adjudged, and decreed by the court that said motion be, and the same is hereby, in all things overruled; to which ruling of the court the defendants except and give notice of appeal in open court to the court of civil appeals, 2nd supreme judicial district of Texas; and the parties in this cause are given ten days after the adjournment of this court in which to file their statement of facts.

58 *Defendants' Bill of Exceptions No. 1.*

Filed March 13, 1893.

STATE OF TEXAS
vs.
F. P. OLCOTT *et al.* } No. 269. Pending in the District Court of Nolan County, Texas.

Be it remembered that on the trial of the above-stated cause the defendants read in evidence the deposition of C. C. Gibbs, and the plaintiff objected to the answers of C. C. Gibbs when offered to those numbered four, five, and six; which answers are in words and figures as follows:

IV. To the fourth interrogatory the witness answers: As near as I can now determine, of the certificates issued on that portion of the

road from Brenham to Austin the company has lost 29,353 acres of land by reason of conflict with older locations and surveys, adjustments of surveys, and invalid locations. There may be other surveys lost for the same reason which have not yet come to my knowledge. The attached exhibit, which I have marked A for identification, shows the number of acres considered valid in this issue and the number of acres in each survey in conflict and considered void for this as well as other causes, especially indicated in the exhibit. In the column of remarks is a brief statement of the causes producing the losses in these surveys, which is approximately correct.

V. To the fifth interrogatory the witness answers: In my answer to the fourth interrogatory I have answered this, and beg to refer again to the statement hereto attached and marked "Exhibit A." None of the certificates of this issue were lost or forfeited for non-return to the general land office, but subsequent to their location conflict with older surveys and deficiencies in blocks were discovered, necessitating corrections to relieve the conflicts, thus reducing the acreage or compelling an abandonment of the entire survey.

59 VI. To the sixth interrogatory the witness answers: I have attached to these answers a tabulated statement and marked it "Exhibit A" for identification, in answer to this interrogatory.

The said exhibits referred to are as follows:

"EXHIBIT A."

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
35/3497	1	41	Hemphill....	640		
3498	3	"	" ...	636	4	
3499	5	"	"	632	8	
3500	7	"	"	630	10	Corrected to relieve
3501	9	"	"	628	12	conflict with H. &
3502	11	"	"	624	16	G. N. R'y Co. sur-
3503	13	"	"	620	20	veys.
3504	15	"	"	618½	21½	
3505	17	"	" ..	617	23	
3506	19	41	" ..			
to	to			52,480		
3587	181	"	" ..			
3588	1	42	" ..			
to	to			44,160		
3656	137	"	" ..			
3657	139	42	Roberts....			
to	to			26,880	.....	Exhibit A. Signed
3698	221	"	"			for identification.
3699	1	43	Hemphill..			
to	to			9,600	.....	G. H. Pendarvis, N.
3713	29	"	" ..			P., H. Co., Texas.
3714	31	"	Roberts....			
to	to			4,480		
3720	43	"	"			
3721	45	"	Ochiltree...			
to	to			4,480		
3727	57	"	" ...			

"EXHIBIT A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
3728 to 3757	59 to 117	43 "	Lipscomb .. " ..	19,200		
3758 to 3771	119 to 145	" "	Ochiltree... " ...	8,960		
3772 to 3801	147 to 205	" "	Lipscomb .. " ..	19,200		
3802 to 3815	207 to 233	" "	Ochiltree... " ...	8,960		
3816	235	"	Lipscomb	640		
3817 to 3845	237 to 293	" "	" .. " ..	18,560		
3846 to 3859	295 to 321	" "	Ochiltree... " ...	8,960		
3860 to 3889	323 to 381	"	Lipscomb .. " ..	19,200		
60						
3890 to 3903	383 to 409	43 "	Ochiltree... " ...	8,960		
3904 to 3933	411 to 469	" "	Lipscomb .. " ..	19,200		
3934 to 3947	471 to 497	" "	Ochiltree... " ...	8,960		
3948 to 3956	499 to 515	" "	Lipscomb .. " ..	5,760		
3957 to 3961	87 to 97	64 "	Runnels ... " ...	3,840		
3962	81	"	Taylor.	516	124	Conflict with h'rs Lila Forsythe.
3963	101	"	Runnels.....	640		
3964 to 3967	103 to 109	" "	Taylor. .... "	2,560		
3968	115	"	"	640		
3969	113	"	"	640		
3970	117	"	"	640		
3971	119	"	"	640		
3972	121	"	"	320	192	Conflict with surveys Nos. 119, 120, & 121, bl'k 64.
	127	"	"	128		
3973	123	"	"	640		
3974	125	"	"	640		
3975 to 3992	129 to 163	" "	" ..... "	11,520		
3993	167	"	"	640		
3994	169	"	"	640		
3995	189	"	Nolan.....	179	141	Lost by conflict with Pedro Martinez survey.
	171	"	Taylor.....	320		

"EXHIBIT A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
3996	175	64	Taylor.....	640		
3997	23	2	Tom Green..	640		
3998 to 4008	21 to 1	" "	" "	7,040		
4009 to 4032	25 to 71	" "	" "	15,360		
4033 to 4036	79 to 73	" "	" "	2,560		
61						
4037 to 4054	81 to 115	2 "	Tom Green "	11,520		
4055	213	1	Nolan.....	640		
4056	215	"	"	640		
4057	121	2	Tom Green..	640		
4058	123	"	" ..	640		
4059	125	"	" ..	640		
4060	149	1	Nolan.....	640		
4061	431	"	Tom Green.	640		
4062	451	"	" .	640		
4063	449	"	" ..	640		
4064	153	2	" .	640		
4065	151	"	" ..	640		
4066	149	"	" ..	640		
4067	147	"	" .	640		
4068	145	"	" .	640		
4069 to 4077	143 to 127	" "	" "	5,760		
4078 to 4091	181 to 155	" "	" "	8,960		
4092 to 4103	183 to 205	" "	" "	7,680		
4104	211	"	" ..	640		
4105	209	"	" ..	640		
4106	207	"	" .	640		
4107 to 4143	213 to 285	" "	" "	23,680		
4144 to 4157	313 to 287	" "	" "	8,960		
4158	117	"	" ..	640		
4159 to 4170	31 to 9	1 "	Nolan..... "	7,680		
4171	5	"	"	640		
4172	1	"	Mitchell....	637½	2½	By corrected notes in resurvey of bl'k 1.
4173	3	"	"	640		
62						
4174	7	1	Nolan.....	640		
4175 to 4183	49 to 33	" "	" "	5,760		

"EXHIBIT A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
4184	67	1	Nolan			
to	to			5,760		
4192	51	"	"			
4193	87	"	"			
to	to			6,400		
4202	69	"	"			
4203	107	"	"			
to	to			6,400		
4212	89	"	"			
4213	125	"	"			
to	to			5,760		
4221	109	"	"			
4222	145	"	"			
to	to			6,400		
4231	127	"	"			
4232	147	"	"	640		
4233	151	"	"			
to	to			8,960		
4246	177	"	"			
4247	1	31	Tom Green			
to	to			3,200		
4251	9	"	"			
4252	11	"	Crockett	640		
4253	13	"	"	622	18	Lost by correction and adjustment of bl'k 31.
4254	15	"	"	640		
4255	17	"	"	640		
4256	19	"	"			
to	to			3,200		
4260	27	"	"			
4261	29	"	"	584	56	Lost in correction of surveys of bl'k 31.
4262	31	"	"	588	52	
4263	33	"	"			
to	to			5,120		
4270	47	"	"			
4271	1	32	"			
to	to			6,400		
4280	19	"	"			
4281	11	2	Tom Green			
to	to			7,040		
4291	31	"	"			
63						
4292	1	3	Tom Green			
to	to			8,320		
4304	25	"	"			
4305	3	4	"			
to	to			2,560		
4308	9	"	"			
4309	179	1	Nolan	640		
4310	181	"	"	640		
4311	183	"	"	640		
4312	203	"	"	640		
4313	11	4	Tom Green	640		
4314	13	"	"	640		
4315	15	"	"	640		
4316	291	1	"	640		
4317	287	"	"	640		
4318	307	"	Nolan			
to	to			3,200		
4322	315	"	"			

"EXHIBIT A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
4323 to 4326	325 to 315	1	Nolan	2,560		
4327 4328	289	"	Tom Green	377 640	263	Lost in correction by conflict with older sur.
4329	279	"	"	640		
4330	281	"	"	640		
4331	285	"	"	640		
4332 to 4336	335 to 327	"	Nolan	3,200		
4337 to 4341	345 to 337	"	Tom Green	3,200		
4342	427	"	"	640		
4343 to 4349	347 to 359	"	"	4,480		
4350 to 4357	375 to 361	"	"	5,120		
4358 to 4364	391 to 379	"	"	4,480		
4365	377	"	"	635	5	Lost in correction by reason of conflict with older sur.
4366	409	"	"	600	40	
64						
4367 to 4374	407 to 393	1	Tom Green	5,120		
4375 to 4382	425 to 411	"	"	5,120		
4383 to 4386	439 to 433	"	"	2,560		
4387 to 4400	1 to 27	.....	San Saba	8,960		
4401	29 29½	.....	"	320 320		
4402	31	.....	"	640		
4403	33 33½	.....	"	320 320		
4404 to 4412	35 to 51	.....	"	5,760		
4413	53 53½	.....	"	320 320		
4414	55	.....	"	640		
4415	57 57½	.....	"	320 320		
4416 to 4422	59 to 71	.....	"	4,480		
4423	73 73½	.....	"	320 320		

"EXHIBIT A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
4424 to 4433	75 to 93	.....	San Saba... " ...	6,400		
4434	95	.....	"	320		
	95½	.....	"	320		
4435	97	.....	"	320		
	97½	.....	"	320		
4436	99	.....	"	320		
	99½	.....	"	320		
4437	177	64	Taylor... ...	438	202	Lost in correction by conflict with older sur.
4438	179	"	"	608	32	
4439	181	"	Nolan	627	13	
4440	183	"	"	640		
4441	185	"	"	640		
4442	187	"	"	640		
4443	191	"	"	640		
65						
4444	193	64	Nolan.....	640		
4445	195	"	"	640		
4446	197	"	"	640		
4447 to 4465	1 to 37	2	Pecos..... "	12,160		
4466 to 4485	1 to 39	3	" ..... "	12,800		
4486 to 4491	17 to 27	4	Tom Green "	3,840		
4492	29	"	" ..	453	187	Lost by correction and adjustment of bl'k.
4493	31	"	" ..	640		
4494	33	"	" ..	640		
4495	1	"	" ..	640		
4496	35	"	" ..	640		
4497	37	"	" ..	640		
4498	39	"	" ..	640		
4499 to 4512	57 to 83	5	" "	8,960		
4513	85	"	" ..	540	100	Lost by correction of deficiency in bl'k.
4514 to 4521	1 to 15	"	" "	5,120		
4522 to 4546	1 to 49	33	Ward (formerly Tom Green). "	16,000		
4547	1	1	Presidio (now J. Davis).	640		
4548	3	1	" ..	640		
4549	5	"	" ..	528	112	Conflict with older surveys and corrected.
4550	7	"	" ..	603	37	
4551	1	2	" ..	640		
4552	11	1	Pecos.....	640		
4553 to 4559	13 to 25	"	" ..... "	4,480		

"EXHIBIT A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
4560	3	1	Presidio (now Jeff. Davis).			
to	to			8,960		
4573	29	"	"			
66						
4574	55	1	Pecos.....			
to	to			3,840		
4579	65	"	"			
4580	31	2	Presidio, now Jeff. Davis.	640		
4581	33	"	" ..	640		
4582	35	"	" ..	640		
4583	1	3	"			
to	to			6,400		
4592	19	"	"			
4593	93	1	Pecos.....	544	96	Conflict with H. & G. N. R'y Co. surveys.
4594	95	"	"			
to	to			4,480		
4600	107	"	"			
4601	21	3	Presidio, now Jeff. Davis.			
to	to			5,760		
4609	37	"	"			
4610	1	4	" ..	640		
4611	3	"	" ..	640		
4612	131	1	Pecos.....	311	329	Conflict with H. & G. N. R'y Co. surveys.
4613	133	"	"			
to	to			5,120		
4620	147	"	"			
4621	149	"	"	516	124	Conflict with H. & G. N. R'y Co. surveys.
4622	5	4	Presidio, now J. Davis.	640		
4623	7	"	" ..	640		
4624	9	"	" ..	640		
4625	11	"	" ..	640		
4626	159	1	Pecos.....	640		
4627	13	4	Presidio, now J. Davis.			
to	to			3,840		
4632	23	"	"			
4633	173	1	Pecos.			
to	to			5,120		
4640	187	"	"			
4641	189	"	"	378	262	Conflict with H. & G. N. R'y Co. sur.
4642	25	4	Presidio, now J. Davis.			
to	to			3,200		
4646	33	"	"			
67						
4647	1	28	Mitchell....			
to	to			.....	16,000	Lost in T. & P. reserve.
4671	49	"	"			
4672	249	1	Nolan.....	640		
4673	251	1	"	640		
4674	271	"	"			
to	to			6,400		
4683	253	"	"			
4684	305	"	"	640		

"EXHIBIT A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
4685	303	1	Tom Green..	640		
4686	25	5	" ..	640		
4687	301	1	" ..	640		
4688	299	"	" ..	640		
4689	295	"	" ..	640		
4690	293	"	" ..	640		
4691	277	"	" ..	640		
4692	275	"	" ..	640		
4693	273	"	" ..	640		
4694	429	"	" ..	640		
4695	297	"	" ..	569	71	Lost in correction by adjustment of bl'k.
4696	283	"	" ..	640		
4697	447	"	" ..	640		
4698	445	1	" ..	640		
4699	443	"	" ..	640		
4700	441	"	" ..	640		
4701	457	"	" ..	640		
4702	455	"	" ..	640		
4703	453	"	" ..	640		
4704	469	"	Nolan...	387	253	Lost in correction by conflict with older surveys and adjustment.
4705 to 4709	467 to 459	" "	" ..... } " ..... }	3,200		
4710 to 4713	477 to 471	" "	Tom Green } " }	2,560		
68						
4714	483	1	Tom Green..	541	99	Lost by correction by conflict with older survey and adjustment.
4715	481	"	" ..	640		
4716	479	"	" ..	640		
4717	199	"	Nolan.....	640		
4718	119	2	Tom Green..	640		
4719	201	1	Nolan.....	640		
4720 to 4726	197 to 185	" "	" ..... } " . ... }	4,480		
4727 to 4730	205 to 211	" "	" .... } " ..... }	2,560		
4731 to 4736	217 to 227	" "	" ..... } " ..... }	3,840		
4737	231	"	"	640		
4738	229	"	"	640		
4739 to 4746	233 to 247	" "	" ..... } " ..... }	5,120		
4747 to 4766	1 to 39	1 "	Tom Green } " }	12,800		
4767 to 4774	1 to 15	2 "	" } " }	5,120		
4775	19	"	" ..	640		
4776	23	"	" ..	640		
4777 to 4781	27 to 35	" "	" } " }	3,200		

"EXHIBIT A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
4782	37	2	Tom Green..	232	408	Lost in correction by deficiency in block.
4783	39	"	" ..	640		
4784	1	3	"			
to	to			7,680		
4795	23	"	"			
4796	1	4	"			
to	to			12,800		
4815	39	"	"			
69						
4816	1	5	Tom Green			
to	to			8,320		
4828	25	"	"			
4829	1	6	" ..	640		
4830	5	"	" ..	530	110	Lost in correction by deficiency in block.
4831	7	"	" ..	591	49	
4832	9	"	"			
to	to			5,760		
4840	25	"	"			
4841	51	33	"			
to	to			12,800		
4860	89	"	"			
4861	91	"	" ..	632	8	T. & P. reserve.
4862	93	"	" ..	613	27	" "
4863	95	"	" ..	640		
4864	97	"	" ..	640		
4865	99	"	" ..	340	300	" "
4866	101	"	" ..	74	566	" "
4867	103	"	"			
to	to			.....	8,960	Lost in T. & P. reserve.
4880	129	"	"			
4881	7	34	"			
to	to			2,560		
4884	1	"	"			
4885	11	"	" ..	640		
4886	9	"	" ..	640		
4887	17	"	" ..	640		
4888	15	"	" ..	640		
4889	13	"	" ..	640		
4890	25	"	"			
to	to			2,560		
4893	19	"	"			
4894	31	"	" ..	640		
4895	29	"	" ..	640		
70						
4896	27	34	Tom Green.	640		
4897	39	"	"			
to	to			2,560		
4900	33	"	"			
4901	45	"	" ..	640		
4902	43	"	" ..	640		
4903	41	"	" ..	640		
4904	51	"	" ..	640		
4905	49	"	" ..	640		
4906	47	"	" ..	640		
4907	59	"	"			
to	to			2,560		
4910	53	"	"			
4911	67	"	" ..	640		

"EXHIBIT A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
4912	65	34	Tom Green..	640		
4913	63	"	" ..	640		
4914	61	"	" ..	640		
4915 to 4967	69 to 173	"	"	33,920		
4968	181	"	" ..	640		
4969	179	"	" ..	640		
4970	177	"	" ..	640		
4971	175	"	" ..	640		
4972 to 4976	191 to 183	"	" "	3,200		
4977 to 4981	201 to 193	"	" "	3,200		
4982 to 4986	211 to 203	"	" "	3,200		
4987 to 4996	213 to 231	"	" "	6,400		
71						
4997 to 5007	199 to 219	64	Nolan ..... "	7,040		
5008 to 5012	221 to 229	64	Taylor..... "	3,200		
½5013	231	"	"	320		
½5013	315	"	"	320		
5014 to 5019	233 to 243	"	" ..... "	3,840		
5020 to 5025	245 to 255	"	Nolan ..... "	3,840		
5026 to 5036	257 to 277	"	" ..... "	7,040		
			Sheet No. 1	175,885½	114½	
			2	122,756	124	
			3	59,827	333	
			4	72,320		
			5	54,379½	20½	
			6	42,772	108	
			7	40,652	308	
			8	38,153	247	
			9	67,404	436	
			10	46,171	549	
			11	29,747	16,333	
			12	31,008	352	
			13	74,278	602	
			14	20,894	9,826	
			15	69,120		
			16	16,880		
			Grand total..	956,247	29,353	

72 The court thereupon sustained said objection and defendants were not permitted to read said answers nor said exhibit; to which ruling of the court in excluding the same the defendants then and there excepted, and now here tender their said bill of exceptions in open court, and pray the same to be signed, approved, and made a record in said cause.

T. D. COBBS,
Att'y for Defendants.

Approved:
WM. KENNEDY,
Judge 32nd Dist.

Endorsed as follows, to wit:
Defendants' bill of exceptions No. 1. Filed March 31st, 1893. John C. Cox, clerk dist. court, Nolan Co., Texas.

Defendants' Bill of Exceptions No. 2.

Filed March 31, 1893.

STATE OF TEXAS *vs.* F. P. OLCOTT *et al.* } No. 269. Pending in the District Court of Nolan County, Texas.

Be it remembered that on the trial of the above-stated cause the defendants offered in evidence the deposition of Geo. W. Polk, and the plaintiff objected to the answers of the said Geo. W. Polk when offered to those numbered four and five; which answers are in words and figures as follows:

IV. To the fourth interrogatory he answers: "Of the certificates issued to it on that part of its road from Brenham to Austin the company lost by conflicts twenty-nine thousand two hundred and thirty-one acres, approximately."

V. To the fifth interrogatory he answers: "Of the certificates as located nine hundred and fifty-six thousand four hundred and thirty-one are invalid. The lands lost were on account of conflicts with prior locations."

73 The court thereupon sustained said objection and defendants were not permitted to read said answers; to which ruling of the court in excluding the same the defendants then and there excepted, and now tender their said bill of exceptions in open court and pray the same to be signed, approved, and made a record in said cause.

T. D. COBBS,
Att'y for Defendants.

Approved:
WM. KENNEDY,
Judge 32nd District.

Endorsed as follows, to wit:
Defendants' bill of exceptions No. 2. Filed March 31st, 1893. John C. Cox, clerk dist. court, Nolan Co., Texas.

Statement of Facts.

Filed May 1, 1893.

STATE OF TEXAS *vs.* F. P. OLCOTT *et al.* } Tried in the District Court of Nolan County.

Be it remembered that on the trial of the above-stated cause the following proceedings were had, and which embraces all the material facts introduced upon the trial of said cause:

The State introduced in evidence the following agreement between the parties, which is as follows, to wit:

Agreed Statement.

An agreed statement of facts to be used in the trial of the following cause.

In the District Court of Nolan County, Texas.

THE STATE OF TEXAS *vs.* THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, FREDERICK P. OLCOTT, and GEORGE E. DOWNS.

We agree that the facts in this case are as follows:

74 1. That the defendants received from the State of Texas 1,540 land-scrip certificates for 640 acres each, all of which have been located and surveyed on public domain, and each of said certificates being in form and substance as "Exhibit A" hereto attached.

2. That each and all of the said 1,540 land-scrip certificates, in which are included the ones involved in this suit, were issued for and upon that portion of defendants' line of railway extending from the city of Brenham, in Washington county, to the city of Austin, in Travis county, as more fully appears from "Exhibit B" hereto attached.

3. That defendants' main line of track from the city of Brenham, in Washington county, to the city of Austin, in Travis county, mentioned in each of said certificates, is $93\frac{3}{17}\frac{3}{6}$ miles and the sidings and switches at and between the same points is $2\frac{3}{6}\frac{5}{6}$ miles.

4. That the land- described in plaintiff's petition were located and are now held without patent by the defendants by virtue of said certificates, according to the number and description set forth in said petition.

5. That the construction of that portion of defendants' line of railway from the city of Brenham, in Washington county, to the city of Austin, in Travis county, was begun and completed at the time stated in the affidavit of Capt. Howe hereto attached, marked "Exhibit C."

6. That all special acts of the legislature of the State of Texas, all railroad charters and amendments thereto, bearing upon the subject-matter of this litigation may be considered in evidence and read to the court without introducing the same.

7. Any other pertinent fact may be introduced in evidence by either party on the trial.

8. That the defendants paid taxes on the land- sued for
75 continuously since they were located up to the present time.

9. That the defendants paid all the fees of locating and surveying the said lands sued for, as well as for the same number of alternate sections, known as the even numbers, for the public free-school fund.

10. The various engineers appointed by the different governors to inspect railroads, as the same were constructed in their respective reports of inspection to the said governors respectively, stated the number of miles and feet of main track; the number of miles or feet of siding; the number of miles or feet of bridges, culverts, and trestles; the number of depots, cars, engines, weight of iron, and width and character of track and grade. The action of the respective governors (except Governor Roberts) in said reports *were* usually in the following words: "Report examined and approved;" upon which reports and action of the respective governors the com. gen. land office issued to the respective companies certificates for main track and sidings in form as shown in "Exhibit A." During the administration of Governor Roberts the reports of the engineers were in form and substance of those made to other governors, but he approved for only the number of miles of main track stated in the reports. In one instance during the administration of Gov. Davis he approved a report of sidings exclusively, for which certificates were issued in usual amount per mile. This was also done in one instance by Gov. Hubbard, for which certificates were issued. On March 13th, 1877, Gov. Hubbard made the following endorsement on one of the reports: "This report of Inspector Gray examined and approved for 30 miles main track and sidings, as being made, graded, in all respects complying with the law."

11. All facts herein set forth are admitted for convenience, subject to exceptions as to their legal effect, and cannot be used in any other case.

76 12. Exhibit "D," Governor Pease'- letter, of date March 31st, 1856, to Commissioner Crosby; Exhibit "E," letter of Tipton Walker to Gov. Pease; Exhibit "F," letter from A. Groesbeck, V. P. H. & T. C. R. R. Co., to E. J. Davis, governor; Exhibit "G," letter from E. J. Davis to Jno. W. Glenn, instructing him to inspect road and report; Exhibit "H," report of Jno. W. Glenn, civil engineer, to Gov. Davis, and Exhibit "I," letter from Gov. Coke to J. J. Gross, are to be taken as part of this agreement.

13. That the lands sued for and described in plaintiff's petition are situated in Nolan county, Texas, in what is known as the Pacific reservation, created by special act of the legislature, of date May 2nd, 1873, entitled "An act to adjust and define the rights of

the Texas & Pacific Railway Company within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean." But nothing in this clause of the agreement shall be construed so as to prevent the defendants from proving and establishing their prior right to said lands.

14. That either party may introduce in evidence any certified copies from any of the departments of state or surveyor's office bearing upon this case, subject to exception as to relevancy.

15. Continuously since the adoption of the act of January 30th, 1854, up to Sept. 10th, 1889, patents to lands located and surveyed by virtue of certificates issued to railways for the construction of main tracks and sidings have been issued and delivered, but in no case do any such patents disclose upon their face that the certificates upon which they are based were issued for sidings or switches.

16. That the files and records of the general land office shows that the land- in controversy in this suit were located and surveyed at the time stated in plaintiff's petition.

77

J. S. HOGG, *Att'y Gen'l, &*
R. H. HARRISON, *Assistant,*
For State of Texas.
BAKER, BOTTS & BAKER,
T. D. COBBS, *Att'y- for Def'ts.*

"EXHIBIT A."

No. 40,5001. *Land Scrip.* 640 acres.

THE STATE OF TEXAS, GENERAL LAND OFFICE.

This is to certify, that the Houston & Texas Central Railway Company having completed a section of ninety-three and one hundred and thirty-two one hundred and seventy-sixth- ($93\frac{132}{176}$) miles of main track, and two and thirty-five sixty-sixth- ($2\frac{35}{66}$) miles of siding from Brenham to Austin city, is entitled, under the provisions of its charter and the general laws governing the same, to six hundred and forty acres of land, to be located upon any of the unreserved vacant and unappropriated public domain of the State of Texas, and surveyed in the following manner: First. Two sections of land adjoining and connecting with each other must be surveyed, one for the State and the other for the company. Second. The surveys to be made square, unless prevented by previous entries or navigable streams. Third. When the field-notes have been returned to the general land office, the commissioner will number the surveys and report the result to the surveyor, who will fill up the blank left in his record for that purpose, accordingly.

(As a matter of convenience, in describing the surveys when reporting the numbers, the surveyor should number the field-
78 notes temporarily, in pencil.)

Fourth. In dividing the surveys, a fraction of over three hundred and twenty acres will be counted as a whole section, and two fractions of less than three hundred and twenty acres will be

regarded as a section. Fifth. The even numbers will be reserved for the State and the odd numbers to the company.

In testimony whereof, I hereunto set my hand and affix the impress of the seal of said office, this first day of July, 1872.

JACOB KUECHLER,
Commissioner.

"EXHIBIT B."

Letter from Elgin to Kuechler, Commissioner.

AUSTIN, TEXAS, *June 19th*, 1872.

Hon. Jacob Kuechler, com. gen. land office, Austin.

DEAR SIR: As agent of the Houston & Texas Central Railway Company, I hereby apply for (1,896) eighteen hundred and ninety-six certificates for six hundred and forty acres of land each, being the amount to which said company is entitled by virtue of having completed (110.78) one hundred and ten and $\frac{78}{100}$ miles of main track and (7.72) seven and $\frac{72}{100}$ miles of side track, making ($118\frac{1}{2}$) one hundred and eighteen and one-half miles on the main line of said railway—that is to say, from the (100th) mile point at the town of Bryan to a point near the depot at Corsicana ($\frac{78}{100}$) seventy-eight one-hundredths of a mile beyond the two hundred and tenth (210th) mile point from the terminus at Houston. * * *

Also for (1,540) fifteen hundred and forty certificates of like character, by virtue of having completed ($93\frac{32}{176}$) ninety-three
79 and $\frac{32}{176}$ miles of main track and ($2\frac{5}{6}$) two and $\frac{5}{6}$ miles of sidings on the Western branch of said railway, making ($96\frac{32}{176}$) ninety-six and $\frac{32}{176}$ miles, and being that portion extending from the town of Brenhan to the city of Austin. * * * For evidence of all which, and that the same has been completed in accordance with the charter of said company and general laws regulating railroads in Texas, you are respectfully referred to the several reports of C. D. Anderson, civil engineer, appointed by the governor to examine the main line, and John W. Glenn, civil engineer, appointed to examine the Western branch, copies of which are filed herewith, and the sworn certificates of the several chief engineers engaged in the construction of the road.

Very respectfully,
ROB'T M. ELGIN,
Land Ag't, H. & T. C. R. W.

(Filed in the gen'l land office May 26th, '73.)

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *July 5th*, 1872.

Rob't M. Elgin, Esq., Austin, Texas.

SIR: I have the honor herewith to acknowledge the receipt of a map and profile of the Western branch of the Houston & Texas Central railway from the town of Brenham, in Washington county, to the city of Austin, which have been duly filed.

Yours very respectfully,
JACOB KUECHLER.

80 "EXHIBIT C."

Howe's Affidavit.

STATE OF TEXAS, }
County of Harris. }

I, M. G. Howe, chief engineer of the Houston & Texas Central Railway Co., hereby certify that the following sections of the Western branch of the Houston & Texas Central railway were completed, with the necessary turnouts and sidings, at or before the dates respectively stated herein, viz: 1st. The first section, extending from Brenham to Ledbetter, twenty-five miles, was completed by the 20th day of January, 1871; 2d, the second section, extending from Ledbetter (25) twenty-five miles to a point six miles east of McDade, was completed by the 15th of September, 1871; 3, the third section, extending from the last-named point (25) twenty-five miles to a point four miles east of Manor, was completed by the 26th day of November, 1871; 4th, the fourth section, extending from the last-named point to the terminus in the city of Austin (18¾) miles, was completed on the 25th day of December, 1871; and that I was the chief engineer in charge of the work at the time of the completion of the several sections as above stated.

H. G. HOWE,
Chief Engineer, H. & T. C. R. R.

Sworn to and subscribed before me, E. Simmler, a notary public for Harris county, State of Texas, this 27th day of May, 1872.

Given under my hand and seal of office this 27th day of May, A. D. 1872.

[SEAL.] E. SIMMLER,
Notary Public, Harris County.

Vol. 4, fo. 211, No. 3255.

(Filed in gen'l l'd office May 26, '73.)

81 "EXHIBIT D."

Governor Pease's Letter.

EXECUTIVE OFFICE, AUSTIN, TEXAS, *March 31st*, 1856.

S. Crosby, Esq., com. gen'l land office.

SIR: The president of the Buffalo Bayou, Brazos & Colorado Railroad Company notified me a short time since that said company had completed and put in running order a section of twenty-five miles and more of its road; whereupon, there being no State engineer, I appointed, under the provisions of "An act to encourage the construction of railroads in Texas by donations of land," approved January 30th, 1854, Tipton Walker, Esq., of Galveston county, as an engineer to examine said section of road, and I now enclose you a copy of his report under oath, with the affidavits ac-

companying the same, from which you will perceive that he reports the same action (with the necessary turnouts), 32.12 miles, as constructed in accordance with the provisions of its charter and of the general laws of the State in force regulating railroads. In acting upon this report you will bear in mind that this company has already received from this State eight sections of land per mile for nineteen and a half of miles of this road. Consequently it cannot receive under the laws of the 30th January, 1854, but eight sections per mile for said nineteen and a half miles. You will also bear in mind that said company is under no circumstances entitled to receive more than sixteen sections per mile for any portion of its road.

Very respectively, E. M. PEASE.

Endorsed: B. B., B. & C. R. R. Letter from the governor to commissioner of land office in regard to donation of land.
82 Copy of letter to commissioner land office, March 31, '56. Recorded on page 453.

"EXHIBIT E."

Letter from Walker to Pease.

HARRISBURG, TEXAS, *March 24th*, 1856.

His Excellency E. M. Pease, governor of Texas.

SIR: In compliance with the instructions contained in your letter under date of the 14th inst., I have examined and inspected the first and second sections of the Buffalo Bayou, Brazos & Colorado railroad, and would now most respectfully submit the following report of my inspection:

The first section of the road, between Harrisburg and Staffords Point, a distance of nineteen and a half miles, having been previously inspected and reported upon by a commissioner specially appointed for the purpose, renders it only necessary on my part to confirm the accuracy of the commissioner's report and to say that after two years' use I found it in good working order and to present a must better appearance than I anticipated.

In some places cross-ties (although on this section all are of cedar and post oak) were very much decayed and the road in rather bad condition in consequence of the incessant rains that have fallen during the last two months, and that, too, at a time when the greatest amount of business was being transacted. I found workmen on the top busily engaged in repairing damages and substituting new ties where they were necessary. I have no doubt that after a few days fine weather this section of the road will present as good appearance as it has at any time previously.

The decay of the ties in so short a period of time is at-
83 tributable to the fact that this section of the country is almost destitute of timber suitable for good ties, rendering it necessary to use an inferior quality which soon gives away under the deteriorating influences of the climate, etc.

The second section of the road, from Staffords Point to the Brazos river, a distance of twelve and a half miles, is in the main good. There are some unsightly portions, owing to the frequent rains and the nature of the earth composing the road-bed, which in wet weather becomes very soft and yielding and the superstructure necessarily gets out of adjustment from the action of the train going over it whilst in this condition. This will in a great measure be remedied when the road is well "ballasted." Proper material for this purpose cannot be had in this section, and I suppose the road will have to remain without permanent ballast until when in the farther prosecution of the work the road reaches a section where suitable material can be obtained.

In your letter of instructions my attention is particularly called to the following points, viz:

1st. Whether that section of the road completed since the 30th January, 1854, has been constructed with rails weighing at least fifty-four pounds to the yard.

2nd. "The actual length of the road completed."

3rd. "How much of it was completed and in running order by the 11th of February, 1854?"

4th. "How much of it was completed and constructed previous to 30th January, 1856?"

5th. "Whether said road has been completed in a good and substantial manner."

To these interrogatories I have to reply that no iron of less weight than fifty-four pounds per yard has been used in the construction of any part of this road, the average weight being
84 about sixty pounds per yard. I had no opportunity of weighing the iron at the time of my inspection, but a large portion of it passed the custom-house at the time of its importation under my supervision and in consequence its weight was well known to me. The entire road from Harrisburg to the Brazos river at Richmond is now completed and in running order. The times when the different sections were so completed and the length of these sections — by the affidavits annexed.

I did not personally measure the length of the track and sidings, although I passed over them, being satisfied that it was correctly stated in the affidavit of John W. Stump, formerly the assistant engineer of the company, which I caused to be made and to be hereto annexed. I also confirm the statement made in the affidavit of John A. Williams, chief engineer, in respect to the amount and character of the equipment and other appurtenances of the road, so far as my general observation enables me to judge.

By reference to the affidavits of J. W. Stump, W. J. Kyle, and B. F. Terry, herewith accompanying, it will be seen that twenty miles was completed prior to the 11th of February, 1854, and twelve miles and $\frac{12}{100}$ have been completed since that time and previous to the 30th January, 1856.

The next point is as to whether the road has been completed in a good and substantial manner. To this I have to say that the road does not in all respects conform to my ideas of "a first-class

road," but — the absence of any specifications on the part of the State as to what constitutes a first-class road or even a "good and substantial one," and in a section of country like this, where the work had to be prosecuted under so many natural disadvantages, as, for instance, want of suitable timber for cross-ties, a flat, level prairie, where it is difficult to keep up a proper system of drainage, a soil so soft that after the slightest rain the embankment yields to the pressure of the train going over it and with no material for
85 ballasting, it would be unfair to subject this section of the road to a rigid criticism, and which I do not feel disposed to make. The rails, chairs, and spikes are certainly "first class," being in my opinion quite equal to the average used through the Union, and notwithstanding the first twenty miles have been in use for about two and a half years scarcely any wear of the rail is perceptible. I am therefore inclined to the opinion that under a fair construction of the terms the road has been constructed in a good and substantial manner, and that it fully answers all the purposes for which it was intended. The statement in the affidavit of the chief engineer that the trains have run regularly without accident and have done all business that has offered itself, and indeed a larger business than was perhaps to have been inspected, is the best proof that I have to offer for the correctness of my conclusion. So far as I am able to judge, I find nothing in the operation of the company but what is in conformity with the provisions of the charter and in accordance with the laws of the State with regard to railroads. In conclusion, I have to say that the foregoing report contains all the information I have been enabled to obtain in the course of my examination.

When it was necessary to take affidavits of persons as to facts which were not personally known to me I have obtained the testimony of reliable and credible gentlemen with whom I am acquainted. I have as far as possible given categorical answers to your interrogatories, besides such other facts as might be of use to you in determining whether the road is entitled to receive from the State the donation of land which is claimed for it.

I am, sir, with high*ly* respect, your obedient servant,

(Signed) TIPTON WALKER.

Sworn to and subscribed before me this 24th March, 1856.
Witness my hand and notarial seal, at office, in Houston.

[L. S.] (Signed) J. B. DART,
Notary Public, Harris County.

86 "EXHIBIT F."

Letter from Groesbeck to Davis, Governor.

Office of the Houston and Texas Central Railway Company.

HOUSTON, *February 9th*, 1872.

To His Excellency Edmond J. Davis, governor of the State of Texas, Austin.

SIR: In behalf of the Houston and Texas Central Railway Company the undersigned has the honor to report the said company has completed and put in running order that additional part extending from the town of Bryan, in Brazos county, to the town of Corsicana, in Navarro county, of its main trunk of road, which additional part includes one hundred and ten miles or four sections of twenty-five miles each and ten miles in length of road.

And that it has also completed and put in running order that additional part extending from the town of Brenham, in Washington county, to the city of Austin, in Travis county, of the Western branch of its main trunk road, which additional part includes ninety-three miles or three sections of twenty-five miles each and eighteen miles of road.

And the said company now respectfully asks that Your Excellency will intrust the engineer appointed by the State to examine the above-mentioned parts of road and report thereon, as provided by law.

Very respectfully, Your Excellency's obedient servant,

(Signed) A. GROESBECK, *V. P.*

"EXHIBIT G."

Instructions to Glenn.

To Col. Jno. W. Glenn, civil engineer:

87 Whereas the "Houston and Texas Central Railway Company," by A. Groesbeck, vice-president thereof, has made known to me that said company has completed and put in running order that additional part extending from the town of Brenham, in Washington county, to the city of Austin, in Travis county, of the Western branch of its main trunk road, which additional part includes ninety-three miles or three sections of twenty-five miles each and eighteen miles of road, you are, therefore, hereby empowered and directed (there being no State engineer) to examine said ninety-three miles of road and report under oath if the same has been constructed in accordance with the provisions of the charter of said company and of the general laws of the State of Texas in force regulating railroads; but this appointment, as in case of other similar appointments made by me, is not to be understood as an admission on the part of the State of Texas of the right

of said company to a grant of lands or as a waiver of any legal or equitable defense which the State of Texas might set up against the claim of said company to such grant of lands.

Given under my hand as governor of the State of Texas and the seal of said State, at the executive office, in the city of Austin, this 12th day of February, A. D. 1872.

(Signed) EDM'D J. DAVIS, *Governor.*

By the Governor:

(Signed) JAMES P. NEWCOMB,
Secretary of State.

"EXHIBIT H."

Report of Glenn.

AUSTIN, *February 21st*, 1872.

His Excellency E. J. Davis, Governor of Texas, Austin, Texas.

88 GOVERNOR: I have the honor to report that in obedience to the commission from you dated February 12th, A. D. 1872, I have carefully examined that part of the railroad owned by the Houston and Texas Central Railway Company lying between the town of Brenham and the city of Austin, Texas, and find between those points ninety-six $\frac{467}{1452}$ miles of railroad, which *has* been constructed according to the provision of its charter and the general railroad laws of the State. The road was located in sections of twenty-five miles and its fractions, giving for each twenty-five miles 1,320 location stations of one hundred feet each. For convenience I use these stations as reference instead of miles, and will letter the series "A," "B," "C," and "D."

SERIES "A."

Station No.	50	7 spans trestle, 16 feet each.
	66	7 " " " " "
	117	7 " " " " "
	137	7 " " " " "
	157	10 " " " " "
	198	3 " " " " "
Little Sandy,	214	5 " " " " "
	228	5 " " " " "
	238	1 wood culvert.
Big Sandy,	255	10 spans trestle, " " "
	290	7 " " " " "
	311	7 " " " " "
	320	5 " " " " "
Mill creek,	356	26 " " " " " and one trussel string of 40'.
	392	Stone culvert box.
	403	" " open.
	418	" " box.
	425	Open.

	431	Open culvert, stone piers, and truss strings 22 — long.
	437	Open culvert, stone piers, and truss strings 22′ long.
	470	Open culvert, stone piers, and truss strings 31′ long.
	480	Stone culvert box.
	487	" " "
	508	7 spans trestle, 16′ each.
Spring branch,	541	4 " and truss strings 22′ long.
	555	Stone culvert box.
	559	" " "
	563	" " "
	575	" " " open.

89

Roberts creek,	590	Trussed strings 22′ long on stone piers.
Indian creek,	604	9 spans of trestle, 16′ each.
	645	Wood culvert.
	667	Turnout, 2,000′ *feet* long.
Burton,	680	3 spans trestle, 14′ each.
	706	3 "
	725	3 "
	737	10 "
	753	7 "
Head Indian creek,	783	Wood culvert.
Cedar,	792	" "
	802	3 spans trestle, 14′ each.
	817	3 "
	833	Wood culvert.
	855	" "
	865	3 spans trestle, 14′ each.
	871	3 "
Crossing Cedar creek,	894	16 "
	906	4 "
	917	5 "
	927	Wood culvert.
	930	Wood culvert.
	938	8 spans trestle, 14′ each.
	966	Wood culvert.
	1037	5 spans trestle, 14′ each.

Between stations 1037 and 1171 are 4 wood culverts; at 1171 are 3 spans trestle, 14′ each, and 5 wood culverts between that and station No. 1320, end of first twenty-five miles.

SERIES "B."

Ledbetter, station No.	200	Turnout, 2,893 feet long; 2 wood culverts.
	230	Water tank; 2 wood culverts.
	282	4 span- trestle, 14′ each; 5 wood culverts.
	387	3 spans trestle, 14′ each.
	432	2 "
	452	2 "
Giddings,	508	2 wood culverts and 2,535′ *feet* turnout; 1 wood culvert.
	540	3 spans trestle, 14′ each; 2 wood culverts.
	570	Section-house.
Station No.	586	2 spans trestle, 14′ each; 1 wood culvert.
	612	4 spans trestle, 14′ each.
	632	4 "
	681	2 " 1 wood culvert.
	707	3 spans trestle, 14′ each; 1 wood culvert.
	736	4 spans trestle, 14′ each.
	764	4 spans trestle, 14′ each.
	786	6 "
	800	5 " 3 wood culverts; 1 section-house.
90	815	3 spans trestle, 14′ each. 2 wood culverts.
	828	2 spans trestle, 14′ each.
	840	3 spans trestle, 14′ each.
	864	3 " 5 wood culverts.
	903	7 spans trestle, 14′ each. 2 wood culverts.
	928	5 spans trestle, 14′ each. 1 wood culvert.
	1297	Section-house.
	1306	Water tank.
	1307	6 spans trestle, 14′ each. 2 wood culverts.
	1320	End of *section* twenty-five miles.

SERIES "C."

96	3 spans trestle, 14′ each.
114	5 "
158	3 "
165	2 "
	Wood culvert.

	210	3 spans trestle, 14′ each.
	220	3 "
		2 wood culverts.
	231	3 spans trestle, 14′ each.
	272	3 "
		Section-house.
	317	6 spans trestle, 14′ each.
McDade,	344	Turnout, 1,409 feet long.
	360	3 spans trestle, 14′ each.
	368	5 "
	396	3 "
Mchaughlins creek,	433	15 "
	462	3 "
	492	6 "
Britton creek,	504	3 "
	514	5 "
	530	7 "
Big Sandy,	563	40 "
		Water tank and one truss-string opening 35′ *feet* long.
	580	4 span- trestle, 14′ each.
		3 wood culverts.
	650	Section-house.
	653	3 spans trestle, 14′ each.
Section No.	672	2 wood culverts.
	708	3 spans trestle, 14′ each.
Spring branch,	735	3 "
		9 "
		1 wood culvert box.
	756	4 spans trestle, 14′ each.
	767	3 spans trestle, 14′ each.
	790	4 "
	800	3 "
	820	3 "
	832	3 "
	853	3 "
	895	Section-house.
Little Sandy,	902	9 spans trestle, 14′ each.
	942	3 "
91	950	4 spans trestle, 14′ each.
	970	5 "
	987	3 "
	1009	3 "
	1014	3 "
	1029	4 "
	1040	3 "
	1048	3 "
	1054	4 "
		1 wood culvert.

	1085	6 spans trestle, 14′ each.
	1132	6 "
	1146	3 "
		Section-house.
Willow creek,	1190	28 spans trestle, 14′ each.
Dry creek,	1209	27 "
Cotton Wood creek,	1236	38 "
	1252	3 "
	1235	3 "
	1295	5 "
	1318	4 "
	1320	End of third twenty-five miles.

SERIES "D."

	79	8 spans trestle, 14′ each.
	92	7 "
	140	11 "
	163	36 "
Wilbargers creek,		Water tank & section-house.
		2 wood culverts.
Manon,	205	Turnout 1,818′ long & water tank.
		1 wood culvert.
Gillelands creek,	229	31 spans trestle, 14′ each.
Roundtree branch,	261	19 "
	277	5 "
	284	4 "
	288	3 "
	290	6 "
	293	Wood culvert.
	309	3 spans trestle, 14′ each.
	317	5 "
	329	6 "
Deckers creek,	358	12 "
Station	429	Wood culvert.
	462	4 spans trestle, 14′ each.
	478	3 "
	502	8 "
	509	Section-house & stone culvert box.
	537	13 spans trestle, 14′ each.
	605	25 "
	648	10 "
	658	5 "
Big Walnut,	708	36 "
		2 truss-string openings, 27′ each.
		1 Howe truss bridge, 85′ long, resting on frame piers supported by piles.

	735	13 spans trestle, 14′ each.	
92	747	3	"
	749	4	"
	751	4	"
	754	5	"
	759	9	"
	762	5	"
	775	Section-house.	
	779	23 spans trestle, 14′ each.	
	801	6	"
	817	7	"
	850	5	"
	892	3	"
	932	3	"
	948	Water tank.	
	969	17 spans trestle, 14′ each.	
		2 wood culverts.	
		Turnouts, 2,705′ long.	
Austin,	990	End of track near Congress avenue.	

Recapitulation of Distances.

1st section, "A" series			25 miles.
2nd	"B"		25 miles.
3rd	"C"		25 miles.
4th	"D," 990 stations		$18\frac{132}{176}$ —.
Sidings at Burton		2,000 feet.	
	Ledbetter	2,893	
	Giddings	2,535	
	McDade	1,409	
	Manor	1,818	
	Austin	2,705	
		13,369	$2\frac{35}{66}$ miles.
Total			$96\frac{407}{1452}$ miles.

Just where the general laws of the State of Texas cease in their requirements for construction and just when they begin in their requirements for management is a question which caused me much study and reflection before I could come to such a conclusion as would admit of no reasonable doubt.

In the matter of construction the State protects herself from imposition by an ability to withhold aid promised, while in the matter of management she has by her general laws imposed special penalties for the violation of those laws.

Mile-posts and sign-boards are required by the general laws; yet they are no more a part of the construction of the road than
93 officers' badges, section-houses, tanks, &c. They are, however, necessary in the management of the road, and for their absence and that of badges, &c., the laws provides special penalties.

With that conclusion arrived at, I confined myself exclusively to a consideration of such requirements of the laws as relate to the construction of the road as explained to me by the executive officer of this road. Its policy has been to employ to the utmost its resources of money and credit, and with those resources build the greatest number of miles of railway in Texas practicable, reasonably expecting to replace by permanent work such temporary portions as wood culverts, trestle-work and pile and frame supports for bridges before the decay of the same out of the earnings of the road.

I regard this plan as entirely practicable, and if it will add additional miles of railroad and facilities to Texas it certainly is to be recommended.

To carry out these views their chief engineer adopted as the maximum grade one and one-tenth per cent., and within that limit, in order to save in the expense of embankment and excavation, has, as far as practicable, followed the surface meanderings of the country. As a consequence the average amount of earth-work per mile is small. The general line of location from Brenham to Austin I regard as the best that could be made. The minor defects in the details of location *and* beyond the jurisdiction of the present laws of the State of Texas. It is, perhaps, well that they are, for after a road is completed it is exceedingly easy to criticize and too often unjustly condemn. The rail used is of the most approved pattern, and weight fifty-six pounds to the lineal yard. From Brenham to a short distance beyond Burton the railroads are connected by a chair; the remainder of the distance the fish-bar connection is used.

The ties are standard, both as to quality and dimensions and
94 number per mile. The equipment of the road with station-houses, section-houses, water tanks, wood yards, and rolling stock is about completed. Regarded as temporary, the wood culverts, trestle-work, truss springs, and framed supports for the bridges are equal to the standard of temporary work. The condition of the road-bed is fully up to the average and is being improved every day. For the foregoing reasons it affords me pleasure to certify that for the ninety-six and $\frac{407}{1454}$ miles ($96\frac{407}{1454}$) of road inspected the Houston & Texas Central Railway Company has complied with the provisions of its charter and of the general laws of the State of Texas relating to the construction of railroads.

I have the honor to remain, your most ob't servant,

(Signed) JOHN W. GLENN,
Civil Engineer and Commissioner for the State.

Sworn to and subscribed to before me this 24th day of Feb'y, 1872.

(Signed) L. W. COLLINS,
[L. S.] *Notary Public, T. C.*

EXECUTIVE OFFICE, STATE OF TEXAS,
AUSTIN, *February 19th*, 1874.

SIR: I have to inform you that according to the report of the State agent appointed to inspect and survey the Texas & Pacific

railroad eight and five-tenths ($8\frac{5}{10}$) miles of main and single track and of necessary turnouts have been surveyed and inspected and the surveys accepted by me as satisfactory.

Herewith please find certified copy of said report.

Very respectfully,

(Signed) RICHARD COKE, *Gov.*

To Hon. J. J. Gross, com'r gen'l land office.

95 "EXHIBIT I."

Letter, Coke to Gross.

EXECUTIVE OFFICE, STATE OF TEXAS,
AUSTIN, TEXAS, *Sept. 27th*, 1876.

Hon. J. J. Gross, com'r gen'l land office.

SIR: I have to inform you that according to report of H. L. McClung, agent of the State of Texas appointed to inspect and survey the Transcontinental branch of the Texas & Pacific railroad, that one hundred and seven miles (107 m.) and twenty-two hundred and five (2,205) feet of road-bed and four (4 m.) miles and three thousand four hundred and fifty (3,450 ft.) feet of sidings have been surveyed and inspected and the report approved, a certified copy of which please find enclosed.

Very respectfully,

(Signed) RICH'D COKE, *Gov.*

The State here rests.

RECORD OF CAUSE IN U. S. COURT.

Defendants' Testimony.

Defendants offer and read in evidence the printed record in consolidated cause No. 198, in equity, in Galveston, Nelson S. Easton *et al.*, trustees, *vs.* The Houston and Texas Central Railway Company *et al.*, defendants, pending in United States circuit court for the eastern district of Texas, at Galveston, which shows—

First. That all the property of the Houston & Texas Central Railway Company, of every kind and description whatever, was placed in the hands of Charles Dillingham, Nelson S. Easton, and James Rintoul, joint receivers of said railway company, in 1885.

96 Second. A decree entered in said cause, dated the 4th day of May, 1888, foreclosing all the mortgages embraced and covering, among other property, the said property sued for of the said railway company; which mortgages are as follows:

(1.) Mortgages dated July 1st, 1866.
(2.) Mortgage dated December 21, 1870.
(3.) Mortgage dated October 1, 1872.
(3*a*.) Mortgage dated May 1st, 1875.
(4.) Mortgage dated May 7, 1877.

(5.) Mortgage dated April 1, 1881.

Amount of indebtedness for which the property was foreclosed and ordered to be sold, embraces in the mortgages, amounted to $16,823,000.

In said decree Charles Dillingham was appointed master commissioner and authorized and directed to sell the railway, franchises, and all of its lands, &c.

Report of Master on Sale to Olcott.

Defendants also read in evidence report of Charles Dillingham, as special master commissioner, the sale of all of said property to Frederick P. Olcott; which report recited payment by Olcott to him of the consideration purchase price, being $10,580,000, he being the highest bidder; which report was filed on the 26th day of September, 1888. The report recited that the sale was made on the 8th day of September, 1888.

Order Confirming Sale to Olcott.

Order of the court confirming sale of said railway of December 4, 1888, which directed said Charles Dillingham, as master commissioner, to make and execute a deed to Frederick P. Olcott, the purchaser of said property, reciting the consideration therefor as being paid, and further directed as further assurance of the title that the railway company also join in said deed, which was accordingly done.

97 *Deed to Olcott.*

The deed of Charles Dillingham, special commissioner, to Frederick P. Olcott, reciting the payment of the sum of $10,580,000 and confirmation of such sale, &c., and conveying to him all the property of said railway company; which deed was executed by the said Charles Dillingham and by the Houston and Texas Central Railway Company through its proper officers. Said deed dated the 18th of January, 1889, and was executed, acknowledged and delivered, and recorded in Nolan county.

File Made on Lands by Defendant.

Defendants also introduced in evidence the file made by the Houston and Texas Central Railway Company upon said lands, dated July 28th, 1872; which file was as follows, together with the certified copy of the land office map, which original map, by consent of the parties, may be sent to the court with the transcript without having the same recopied:

STATE OF TEXAS, }
County of Bexar. }

To the surveyor of Bexar district:

By virtue of *fu*-ty certificates issued to the Houston and Texas Central Railway Company by the commissioner of the general land office on the first day of July, A. D. 1872, numbered from 40/4997 to 40/5036, inclusive, I hereby file upon the following vacant land in your district, to wit: On the waters of the Colorado and Clear fork of the Brazos in Taylor county, beginning at the S. E. corner of John Trussell's ½ league near the Clear fork of the Brazos and on the line of Travis district, thence west to Trussell's S. W. corner; thence northerly with his line, passing his N. W. corner, and continuing to the Clear fork; thence with the Clear fork and the line of Young district to the W. line of the county; thence south to or opposite to the M. C. Lunicki sur.; thence eastward to and with Lunicki to or — Martinez's N. E. corner; thence S. E. with Martinez's, C. Colenck, Ed. Taylor, and James Jeffries' E. lines to David Harrison; thence northeast and northwest with the lines of Harrison, E. Isias, N. Gwatney, Thos. Lissey, W. F. Smith, T. Berwer, and W. S. Henry to the N. E. corner of said Henry's league; thence S. E. and S. W. with Henry, Jas. Walker, Tos. Linsey, and Elisch Isias to the L. Forsyth league, and with its N. and N. E. line to the line of the county; thence E. with county line of Taylor and Runnels to the John Fobes survey; thence north with Forbes, C. M. Jackson, W. F. Sparkes, Rob't Triplett, and John Kincade to N. W. corner of the latter; thence east with Kincade and Triplett to Smith league, and with its W. and N. lines to the N. E. corner on the line between Bexar and Travis district-; thence N. W. with said line to the beginning.

98

ROB'T M. ELGIN,
Land Agent H. & T. C. Railway.

All valid subsisting entries and surveys are hereby excluded from the above as well as the rocky summits of mountains in vicinity of Mountains pass.

ROB'T M. ELGIN, *Land Ag't.*

Came to hand and filed in my office at 11 o'clock a. m. this 28th day of July, A. D. 1872, in File Book No. 4, page 131.

C. HARNETT, *D. L. B. D.*,
By L. C. NAVARRO, *Dep.*

I, W. M. Lock, district surveyor, Bexar district, do hereby certify that the foregoing is a true and correct copy of the original on record in my office in File Book No. 4, pages 130 and 131.

Given under my hand, at San Antonio, this the 23rd day of October, A. D. 1890.

W. M. LOCKE,
District Surveyor, Bexar District.

99 GENERAL LAND OFFICE,
AUSTIN, TEXAS, *March 24th*, 1892.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original, with endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix the impress of the seal of said office the date last above written.

[SEAL.] W. L. McGAUGHEY,
Com'r G'l L'd Office.

Deposition of R. M. Elgin.

Defendants introduced the deposition of R. M. Elgin.

Answers of the Witness R. M. Elgin.

I.

My name is Robert M. Elgin; am employed in the stationery, printing, and blank-book-making business, residing and doing business in Houston, Harris county, Texas. I have occupied official positions in the general land office of Texas; was connected with it for nearly eighteen years, from early in 1848 to the summer of 1865. For the first four years I was assistant clerk; for the remainder of the time I was chief clerk, more than thirteen years, from 1852 to 1865. In the former capacity I was at first employed for about two years in the patenting-room and about two years as receiving clerk. While acting as chief clerk I had general supervision of the details of the office in all its departments; passed upon applications for patents and for land. When the commissioner was present I was the second officer, and in his absence acted as commissioner.

II.

During the time that I was employed in the land office several railroads received special grants of land from the legislature,
100 but the most important law on the subject was the act to encourage the construction of railroads in Texas by donation of land, approved January 30th, 1854. Nearly all the land certificates granted to railroads while I was connected with the office were granted under that act, and certificates were granted to railroads for sidings.

III.

I have a distinct recollection of the question of the right of a railroad company to acquire lands on sidings having arisen in the first application for land certificates made under the act of 1854. My recollection is more distinct in regard to this circumstance than ordinarily from its importance, the careful attention which I gave it, and the fact that it was the first application under a law about which a great deal had been said and which was of unusual noto-

riety. I remember that Mr. Barnett, the president of the Buffalo Bayou, Brazos and Colorado Railroad Company, presented the application in person for land certificates on a portion of said road. The report of the State engineer who examined the road was made to Gov. E. M. Pease and was sent by him to the land office, accompanied with an autograph letter from the governor to the commissioner, in which he reminded the latter that the company has received already eight sections per mile under its charter on a part of the road, which were to be deducted from the sixteen sections per mile to which it would otherwise be entitled under the general law. The commissioner being absent, it devolved upon me, as chief clerk, to receive and act upon the application. After examining the report of the engineer I figured up the number of certificates to which I supposed the road was entitled, deducted the certificates already received, and remarked to Mr. Barnett that the road was entitled to so many sections, showing him the calculation;
101 the exact number I do not now remember. "But," said he, "we are entitled to certificates also on the sidings." I told him I reckoned not. He asked me if I had examined the statute. I replied that I had, but not with reference to this particular question; that I would do so, however, before issuing the certificates. I accordingly studied the whole act entitled "An act to encourage the construction of railroads in Texas by donation of land," and especially the section to which my attention had been called by Mr. Barrett. After mature consideration I came to the conclusion that the legislature intended to grant land for necessary sidings as well as main track and construed the act accordingly. Whether the decision was right or not, it was made deliberately, honestly, and conscientiously, after careful examination of the act and upon the direct question of the construction to be placed upon the 12th section of the act. I then drew up a form of certificate which, if I remember rightly, stated the number of miles of main track and sidings upon which the lot of certificates were issued. That form, I believe, was followed, if not literally, without material change, by both the land office and the court of claims as long as the law was in force. Stephen Crosby was commissioner of the land office at that time. He returned before the blanks were ready for signature and ratified my action by signing the certificates as I had drawn them. The same construction was followed by other land commissioners and by the court of claims, and the issuance of certificates on sidings was authorized by every governor to whom application was made as long as the act of 1854 was in force.

IV.

The following governors authorized the issuance of certificates on sidings:

102 Gov. E. M. Pease, to the B. B., B. & C. R'y Co.

Gov. H. R. Runnels, to the S. P. R. R. Co. and to the S. A. & M. G. R'y Co.

Gov. Sam. Houston to the S. P. R. R. Co. and the W. Co. R. R. Co.

Gov. Edward Clark, to the W. C. R. R. Co. and the B. B., B. & C. R'y Co.

Gov. J. W. Throckmorton, to the T. & N. O. R. R. Co. and W. C. R. R. Co.

Gov. E. J. Davis, to the G., H. & S. A. R. R. Co.; G., H. & H. R. R. Co., Indianola R. R. Co., Texas & Pacific, H. & G. N. R. R. Co., H. & T. C. R. R. Co., and W. & N. W. R. R. Co.

Gov. Richard Coke, to Texas & Pacific R. R. Co., H. & G. N. R. R. Co., G., C. & S. F. R. R. Co., and G., H. & S. A. R. R. Co.

And Gov. Hubbard to a large number of companies.

Land certificates were issued upon sidings by the following commissioners of the general land office: Stephen Crosby, F. M. White, Jacob Keuchler, and J. J. Gross. They were all the commissioners elected while the act of 1854 was in force. Certificates were also issued on sidings by the court of claims to the B. B., B. & C. R. R. Co., the Washington County R. R. Co., and perhaps to some other company. I will name some of the roads to which the several commissioners issued certificates on sidings: S. Crosby, to the B. B., B. & C. R'y Co., in Gov. Pease's term; S. Crosby, to the T. & N. O. R'y Co. and Washington County R. R., in Gov. Throckmorton's term; F. M. White, to the S. A. & M. G. R. R. Co., in Gov. Houston's term; Jacob Keuchler, to the H. & T. C., G., H. & H., and H. & G. N. R. R. Co.'s, in Gov. Davis's administration, and to other companies; J. J. Gross, to T. & P., G., C. & S. F., and Texas Western, in Gov. Coke's administration. From long experience in the State land office, and a still larger experience in the land offices
103 of some of the railroads, thrown among land men in the land department of the State and officials of the various railroad land offices, I had opportunity of obtaining a general knowledge of the facts stated above, and about two years ago I had occasion to make a pretty thorough examination in the land office and office of the secretary of state to find out what was on record in their offices in regard to the issuance of certificates on sidings, and I have availed myself of data acquired in that examination in answering these interrogatories.

V.

My observation is that it has been the uniform custom to issue certificates on sidings. I have stated above and shown that every elected commissioner of the general land office who served while the law was in force has done so, and almost every governor has authorized it. So far as my personal knowledge is concerned, I have stated the facts in regard to the issuance of the first certificates on sidings. In 1872 I applied for certificates on sidings for the H. & T. C. R'y Co. I concealed nothing, but made application — writing, stating the number of miles of main and side track completed, and the number of certificates applied for. I believe that I referred the official land office to the section under which we claimed them when I made the first application. I know that I pointed out the 12th section of the law of 1854 to State Engineer Glenn, and that he

referred to the section of the law in his report, so that in the case of Gov. Davis and Commissioner Keuchler the question was distinctly brought to their attention, and the certificates were issued with full knowledge of the law and could not have been issued inadvertently.

Answers of the Witness R. M. Elgin to Cross-interrogatories.

104 X 1.

I have stated in my answer to the first direct interrogatory that I was connected with the general land office from 1843 to 1865, and what capacity and my duties.

X 2.

I quit the service of the State in the year 1865—in the summer of that year. For several months after that was unsettled in business. In 1866 I became the land agent of the Texas & New Orleans Railway Company, but at the end of the year resigned and accepted the same position with the Houston and Texas Central Railway Company. I continued with that company from Jan'y 1st, 1867, until July, 1891, when I resigned to go in present business.

X 3.

My answers show, if I have made myself understood, that in all except the fourth direct interrogatory I have made the statement from personal knowledge of the fact, and in my answers to the fourth interrogatory I had availed myself of information obtained from the general land office and the secretary of state's office in giving particulars of which I had only general knowledge. I had some recollection of the action of State officials in issuing certificates and acting upon applications therefor during the time I was chief clerk in the general land office. I had acted as agent for the lands of the Houston and Texas Central, the Washington County, and the Texas and New Orleans and Waco and Northwestern Railway Companies, and had been for more than a year in the service of the land department of the Southern Pacific Company, which embraces in its system the Galveston, Harrisburg & San Antonio—including what was formerly the Buffalo Bayou, Brazos and Colorado railroad and the Columbia Tap R. R.—the Texas and New Orleans R. R.,
105 the New York, Texas and Mexican R. R., and the Gulf, West Texas and Pacific railway, which includes what was originally the San Antonio and Mexican Gulf railway. My relation with the landmen of the Texas and Pacific railway and the International and Great Northern R. R. were such that I had pretty accurate knowledge of the history of their lands, and the information that I received by the examination in the offices above referred to furnished me with particulars of which I had only a general knowledge, and refreshed my memory in regard to facts about which my memory was not clear; but facts recur-ing since my connection with the State government, 1865, in regard to other roads

than those mentioned, if not stated as of my own knowledge, *or* from information acquired from the files and records. I have stated that the Texas and New Orleans R. R. Co. receives certificates on sidings. I was land agent of that company twice, but was not at the time these certificates issued. They were obtained and sold during the interregnum between the time I was first and last land agent of the company. I learned that Land Commissioner McGaughey has stated that certificates did not issue to that road on sidings. My memorandum, however, agrees with my previous expressed opinion to the contrary—that is to say, the memoranda taken from the records of the land office or secretary of state's office—and I think he is mistaken. I never prepared a paper for any one purporting to be a "statement from the records of the land office as to when the Houston & Texas Central Railway Company was completed in sections, what lands were granted to it, when they were granted, and whether sidings were included in the grants, and otherwise giving a full and detailed account of the matters pertaining to these questions." I have no doubt that at different times I made statements to the officers of the company or the attorneys containing the information in regard to all or
106 most of the items enumerated, but I never made a statement in which they were all embraced. I informed the attorney general some months ago that I had previously prepared a statement in regard to the date of completion of the road to the several prominent points thereon, but in that statement there was no allusion to lands or sidings, nor did it purport to have been made from the records of the land office. In the twenty-fifth year that I was in the land office of the company I prepared scores of statements in regard to the lands, but I have none of them in my possession nor any copies, so that if I knew which one was referred to I could not furnish copy.

X 4.

As stated in answer to direct interrogatory No. 3, the application was made by the president of the company in person, and, so far as I remember, there was no correspondence in regard to it, and the decision was evidenced only by the issuance of the certificates.

X 5.

Certificates were issued to the Buffalo Bayou, Brazos & Colorado Railway Company on a section of thirty-three miles, extending westerly from Harrisburg to the Washington County railroad, on the road from Hempstead to Brenham or on a part thereof. I am not certain that all of its certificates were issued before I left the land office, nor am I certain that they were issued prior to 1864. They were issued before that date, according to the best of my recollection and belief. I have handled the certificates, but do not remember the exact date. Certificates were also issued to the San Antonio & Mexican Gulf railroad. They were issued for portions of road leading into Port Lavaca. I examined and passed upon the application and prepared the form of certificate, if I am not

mistaken, and I do not think I am, but I do not remember
107 the exact date of these certificates nor of those issued to the B. B., B. & C. R. R. Co. There was nothing connected with the issuance to fix the dates upon my mind, and without some collateral fact connecting the issuance with some fixed date I would not likely recollect it.

X 6.

My testimony is not based entirely upon examinations made in recent years of the records of the state department, neither were the facts recently discovered. Some of the facts stated have been known to me thirty-five years, others about twenty years. In regard to the matter in which the information was required, I refer to my answers to the fourth direct and the third and fourth cross interrogatories. As to who were the governors, I answer from memory entirely, not having access at this time to any documentary evidence. Gov. E. M. Pease was first elected, I believe, in 1853, and he was in office when the act of 1854, entitled "An act to encourage the construction of railroads in Texas," was passed. It was one of the leading measures of his administration. He was re-elected in 1855. Gov. Runnels succeeded him in 1857. Gov. Houston was elected in 1859, and was deposed about the first of March, 1861, and Lieutenant Gov. Clark became governor. Gov. Lubbock was elected in 1861 and was succeeded by Gov. Murrah in 1863, who served until the "break up" in the summer of 1865. I have stated in my answer to fourth direct interrogatory which of the governors authorized the issue of certificates on sidings. I never knew or heard of any application for land under the act of 1854 being refused any railroad company on account of its being for sidings, and I believe I have examined every application on file, both in the state department and general land office. I do say, as a fact within my personal knowledge, that between the years 1854 and 1864 one or
more applications for land certificates which included sidings
108 were approved by the governor, and, from my own examination, that the practice was uniform and without exception.

X 7.

I held the position of land agent for the Houston & Texas Central Railway Company in June, 1872, and I refer to my answer to cross-interrogatory No. 2 for the time I was so employed. In that year I applied for 3,430 certificates, more or less, for completed road in the H. & T. C. main line and Western branch.

My application was in writing, and I suppose it is now on file in the general land office and will show for itself. Not having seen it for many years, I cannot say how it was worded. If it said anything about the law under which the certificates were claimed it simply asked for the land to which the company was entitled under its charter and the general laws donating lands to railroad companies, without specifying any particular act. This seems to be as definite an answer to the interrogatories as I can well make. It is what I answered in the former deposition. I had no desire to evade

answering it as fully as was warranted by the facts. So far as I know, the company was never called upon to elect any particular law under which it should claim lands and never did. I stated or intended to state in my answer to the fifth direct interrogatory that I called the attention of the engineer who examined the road in 1872 to the twelfth section of the act of 1854 to show him that we were entitled to land upon sidings, and that he referred to that section of the law in his report. I may have referred the commissioner or the chief clerk of the general land office to the same section to show that the company was entitled to lands on sidings. That was the only reference to any particular law under which the company claimed of which I have any knowledge. This, as will be seen by the context, was with reference to sidings. I have consulted
109 no attorney nor any other person in regard to my answer to this or any other interrogatory.

X 8.

The application for the 3,430 certificates was the first that I ever made. In it I asked for certificates on sidings as well as main track, and they were issued as applied for. Application for certificates on main track from Millican to Bryan was made after I became connected with the company and prior to this; but I do not think I made the application. No land certificates were asked for on sidings in that application.

X 9.

I was not residing in Houston nor connected with the Houston & Texas Central railway when the first and second section- were built. From some data, to which I have access at present and suppose to be correct, it was completed to Cypress, 25 miles from Houston, in September, 1856, and to Hocklye, 15 miles from Cypress, in December, 1857, and to Hempstead, 10 miles from Hockley, in June, 1858. I remember being at Hempstead July 4th, 1858, and that the road had just been completed a short time previously to the place.

X 10.

I have no data from which I can give the dates of construction of sidings on the H. & T. C. railway. I was never engaged in the construction or operating departments of the road, and therefore am not so familiar with matters of this kind as those in the department in which I was employed and cannot give exact data from my general knowledge of the road. I would say the sidings at Richardson were made in 1872 or 1873. As to Ferris, I am of the opinion that the sidings were put in after the road had been
110 completed to some point beyond. If the company received certificates on them, they were built in 1872 or 1873; at Bryan and Wellborn in 1867; at Millican and Navasota in 1859 or 1860. I was at Millican in June, 1861, and the road was running to that place. At Courtney and Howth in 1858, 1859, or 1860; at

Hempstead in 1858; at Waller, I do not know, but it was prior to 1860; at Hockley in 1857 or 1858; at Cypress in 1856 or 1857; at Thompsons, I do not know. They were put in after the road was completed to Millican, possibly as late as 1870. At Eureka and Gum Island, I do not know, but it was previous to 1866. At some of the points, notably at Hempstead and Cypress, the side tracks were changed after they were first put in and additions made; but I cannot tell to what extent or at what places other than those mentioned.

X 11.

I do not know how many miles of sidings there are in Houston at this time. There may be ten or a dozen miles. I have no idea how many there were in December, 1869, nor how many miles were built between December, 1869, and December, 1873. I do not know that any were built in that time. I have no maps or other data showing what sidings they have and their length, and I do not now remember for what length of sidings the company received land certificates. It is a fact that I reside in Houston and have resided there for a quarter of a century, but I could not tell the length of the streets nor how many there were in the city, and with a few exceptions could not tell their names without referring to a map. I seldom see the sidings except at street-car crossing- or along the main track in the upper main part of town as I pass on the cars. I could not from my own knowledge tell the side tracks of the H. & T. C. from those of other roads running alongside of them. I am not a professional engineer nor an expert, and could not tell by walking over the road or the sidings how many there are,
111 and if I had the physical ability to walk over the road without great fatigue, as requested, it would not be practicable to give a reliable guess at the length of sidings. I resided in Houston in December, 1869, and 1873, but I do not remember what side tracks the H. & T. C. railway had. If I have "drawn largely from my general knowledge" in answering other interrogatories, it was with regard to matters in the line of my profession. This is not.

X 12.

As a matter of fact, the Houston and Texas Central Railway Company never declared what act or acts it claimed under, and no one was authorized to say under what particular act it claimed, as far as I know and believe.

X 13.

I have ne-r — any letter from Governor Houston to Hotchkiss, and there is no report accompanying the interrogatories, so it is impossible for me to examine them.

Deposition of W. L. McGaughey.

My name is W. L. McGaughey, and residence Austin, Travis county, Texas. I hold the position of commissioner of the general land office of the State of Texas.

There is evidence in this office that certificates which call for sidings and turnouts have been issued to the following railroads in Texas, to wit: The Buffalo Bayou, Brazos & Colorado; Columbus Tap, Denison & Southeastern, East Line and Red River, Galveston, Houston & Henderson; Galveston, Brazos & Colorado Narrow Gauge; Georgetown, Gulf, Colorado & Santa Fé; Galveston, Harrisburg & San Antonio; Gulf, West Texas & Pacific; Houston, East & West Texas; Houston & Great Northern, Houston & Texas Central, Indianola, Longview & Sabine Valley, Southern Pacific, San Antonio & Mexican Gulf, Texas Western Narrow Gauge,
112 Texas & Pacific, Texas & New Orleans, Waco and Northwestern, and Washington County.

On account of the absence of engineers' reports it cannot be determined what number of miles of sidings and turnouts certificates were issued for on some of the railway or parts of railways. In other words, during the time the certificates were issued by the commissioner of claims, owing to the absence of the proper reports, the faces of the certificates in very nearly all cases are the only means of determining the question; and I must say that the face of a certificate is not a reliable guide, because there are many instances of record in this office where sidings are not expressed in the face of the certificates, notwithstanding a fractional part of the certificates is based on sidings or turnouts. Therefore I am unable to state the names of all the governors and under whose administrations certificates for sidings and turnouts were issued to railroad companies. Among the governors under whose administrations certificates for sidings and turnouts were issued are Edw'rd Clark, F. R. Lubbock, Pendleton Murrah, A. J. Hamilton, Jas. W. Throckmorton, E. M. Pease, E. J. Davis, Richard Coke, and R. B. Hubbard. For the reasons above stated, I cannot give the names of all the land commissioners under whose administrations land certificates for sidings and turnouts were issued, but among those who did issue certificates for sidings and turnouts are W. S. Hotchkiss (commissioner of claims), Francis M. White, Stephen Crosby, Joseph S. Spence, Jacob Keuchler, J. J. Gross, and W. C. Walsh. The evidence and authority under which such land commissioners acted (except the missing reports before mentioned and except in a few other instances) are on file in this office, the same being the certificates of the governors and certified copies of the engineers' reports upon which the governors' certificates were based. Where sidings were expressed in the land certificates in most cases the num-
113 ber of miles of main track and the number of miles of sidings are stated.

Answers to Cross-interrogatories.

I do not know how said companies construed the laws, but it is a fact that they did not get any certificates for sidings upon the first hundred miles of their road at the time the certificates upon main track were issued. No sidings were reported for the 1st, 2nd, and 3rd sections, but on the 4th sections sidings were reported and certificates for same were not issued. I cannot state the particular places where siding are located, for the reason the engineer report on that section of the road is not on file in this office. The State engineer's report dated January 5th, 1857, states *at* the first section of 25 miles of the H. & T. C. R'y was finished and in running order on the 27th day of July, 1856. The first certificates were issued March 5th, 1857. I do not know of any record showing that either Governor Runnels or Governor Houston ever reproved certificates for sidings. If the letter dated March 30th, 1860, from Governor Houston to W. S. Hotchkiss in regard to 38 miles of railway of the B. B., B. & C. R. R. is the letter referred to, I do not find anything in it in regard to sidings. The engineer's report on which the letter is based is not on file in this office.

Deposition of C. C. Gibbs.

Defendants read in evidence deposition of C. C. Gibbs.

Answers of C. C. Gibbs.

I represent some of the owners of the land formerly belonging to the Houston and Texas Central Railway Company. I have the custody of the records and archives of all the land originally granted to the Houston and Texas Central Railway Company; they came into my possession through the owners, their agents,
114 and the receiver of the Houston and Texas Central Railway Company.

(*a.*) There were 1,540 certificates issued on that portion of the road from Brenham to Austin, numbered from 3497 to 5036.

(*b.*) These certificates were all located in the counties designated in the statement attached and marked by me Exhibit "A" for identification.

(*c.*) All of said certificates were located, which amounted to nine eighty-five six hundred acres of land.

The amount of taxes paid by the Houston and Texas Central Railway Company, the receiver thereof, and the owners I represent on the lands located by virtue of this issue of certificates will approximate $113,117. The records here are not in all respects complete and I can but approximate this amount. More exact information upon this subject can be had from the comptroller's office. The state departments have abstracted these certificates and surveys. I know by the published official abstracts of land titles. The State and county officials have never refused to accept taxes on these

lands The money was paid to the officers authorized to receive it and I presume was applied as the law directs. I am unable to state the cost of locating, surveying, and plotting all the field-notes of surveys made by virtue of these certificates. The contract price for locating certificates at the time these were located was from $20 to $25 per certificate. This was reasonable, and the work I consider was worth that amount. The patent fees were $5 for survey of 320 acres or less and $6 for surveys for more than 320 acres up to and including 640 acres. Of this issue of certificates there are twenty surveys of the $5 class and 1,424 of $6 class patented, which would amount to $8,644 patent fees paid.

I have not stated that certificates were issued to the Houston
115 and Texas Central Railway Company prior to the construction of the Western branch from Brenham to Austin.

The certificates were issued to said company under its charter and the general and special laws of the State of Texas.

Deposition of Geo. W. Polk.

GEO. W. POLK.

Defendants introduced the deposition of George W. Polk, which is as follows:

He was chief clerk in the land office of the Houston and Texas Central Railway Company.

To the second interrogatory he answered that Mr. C. C. Gibbs was the land commissioner of the company; had the custody of the records and archives of the company, and he was chief clerk in his office.

To the third interrogatory he stated that there were issued to the Houston and Texas Central Railway Company on that portion of its road from Austin to Brenham 1,540 certificates of 640 acres each. The certificates were located in the following counties, viz: Taylor, Crockett, Nolan, Tom Green, Jeff Davis, Pecos, and Mitchell; that there were 985,640 acres located by virtue of such certificates.

He also stated, in answer to the 8th interrogatory, that the land department of the State made an abstract of all the surveys named above.

In answer to the 9th interrogatory he stated that the State had never refused to take any taxes on the land.

U. S. Court Order Discharging Easton & Rintoul as Joint Receivers.

Defendants introduced the following certified copy of order made in consolidated cause No. 198, Nelson S. Easton *et als. vs.* The Houston and Texas Central Railway Company *et al.*, pending in the United States circuit court for the eastern district of Texas, at Galveston, which is as follows:

116 "This cause came on to be heard at this term on the application of Frederick P. Olcott *et al.* to relieve Nelson S. Easton and James Rintoul from further duty as receivers herein

and for other purposes, and was argued by counsel. Whereupon and on consideration whereof it is ordered, adjudged. and decreed that Nelson S. Easton and James Rintoul, two of the joint receivers herein, be, and the same are hereby, relieved from any further duty as joint receivers in this cause, and the said Easton and Rintoul do pass their accounts to date before John G. Winter, special master in chancery herein. It is further ordered, adjudged, and decreed that Charles Dillingham, the other of the joint receivers hereinbefore appointed, be, and he is hereby, continued as sole receiver in this cause, with all the powers, rights, duties, and obligations now resident in him as joint receiver and heretofore established by the order herein entered appointing him and said Nelson S. Easton and James Rintoul joint receivers. It is further ordered, adjudged, and decreed that all rights, claims, and demands arising against the said joint receivers during their administration shall be prosecuted against the said Charles Dillingham alone, and that the said Charles Dillingham shall alone have the right to prosecute and defend all rights, claims, and demands of every kind and nature arising in behalf of or against the said joint receivers or in behalf of or against the *said joint receivers or in behalf of or against the* Houston and Texas Central Railway Company and to prosecute or defend any right, claim, or demand or action at law or in equity which the said joint receivers might have prosecuted or defended under the order of this court. It is further ordered, adjudged, and decreed that the said Charles Dillingham during his sole receivership herein and until the property in his possession shall be delivered to the respective purchasers, Frederick P. Olcott and George W. Downs, shall have power and
117 authority to collect for account of the parties in interest the land notes in his possession as sole receiver, and on payment to him of said notes to execute release of the mortgage securing said notes on the land sold, and he shall further have the power to make sale of and deeds for the lands in his possession heretofore sold to said purchasers, Olcott and Downs, with the direction, however, to report all such sales before deeds are given to the said Frederick P. Olcott of the lands bought by him and to George E. Downs and the Farmers' Loan and Trust Company, trustee, of the land bought by said George E. Downs, with the right in said Frederick P. Olcott respectively to prevent any such sales by timely objection thereto, it being especially understood that no sales of lands bought by said Downs and covered by the mortgage to the Farmers' Loan and Trust Company, as trustee of the first mortgage of the Waco Northwestern division, shall be made free of said mortgage except by and with the consent and deed of said Farmers' Loan and Trust Company, trustee, as aforesaid."

Defendants introduced the following:

U. S. Court Order Restraining Receiver.

United States Circuit Court, Eastern District of Texas.

STEPHEN W. CAREY *et al.*, Appellants,
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.*, Appellees.

It appearing to my satisfaction from the annexed petition and affidavit that the appellants have taken and perfected appeals to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November,
118 1892, which appeals are taken in good faith, and that no injury can accrue to the appellees by a stay of proceedings as herein directed pending the hearing and decision of the said appeals:

Now, therefore, on motion of R. H. Landale, solicitor for complainants—

It is ordered that pending the hearing and decision of the said appeals taken by the complainants to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, Charles Dillingham, the receiver of the Houston and Texas Central Railway Company, be, and he is hereby, stayed from surrendering or delivering possession of the Houston and Texas Central railway or any of the line of railway formerly operated by the Houston and Texas Central Railway Company and of which he is now possessed as receiver, and from permitting the said railways to be operated by any corporation or person other than himself, with liberty to the receiver, the appellees, or any of them, to apply to me to vacate the said stay, if the said appellants fail to prosecute the said appeals with due diligence.

Dated Washington, December 9th, 1892.

L. Q. C. LAMAR,
Associate Justice of the Supreme Court of the United States, Assigned to the 5th Circuit.

Deposition of J. C. Kidd.

Defendants offer the deposition of J. C. Kidd, which is as follows:

Witness answered to the first interrogatory that he was in the employment of the receiver of the Houston and Texas Central Railway Company in the capacity of assistant auditor.

Second. The books, minutes, &c., of the Houston and Texas Central Railway Company have been in the custody of the
119 secretary. At present, owing to the death of Mr. H. Hall, secretary, the said books are in the custody of the witness.

Third. Resolution passed under the provision of the law entitled

"An act for the relief of railway companies, &c.," passed in 1862, restoring the original *bona fide* stockholders of said company, those having paid for their stock, to all the rights, privileges, and immunities to which they were entitled *provides* to and of which they were divested by the sale of the road to W. J. Hutchins and others, passed November 5, 1862, is as follows:

Resolution of Directors of Railway.

Copy of resolution.

Whereas the legislature of the State of Texas — "An act for the relief of certain railway companies," approved January 11, 1862, and "An act for the relief of companies incorporated for purposes of internal improvements by allowing the further time for performance on account of the war," also approved January 11, 1862, which required the assent of the Houston and Texas Central Railway Company to their provisions before the benefit thereof will inure to said company; therefore

Be it resolved by the president and board of directors of said company, That it does consent to and adopt the provisions of said acts, in so far as they expressly apply to said company, "restoring the original *bona fide* stockholders of said company—those who have paid for stock—to all the rights, privileges, and immunities to which they were entitled previous to and of which they were divested by the sale of said road to W. J. Hutchins and others," and subject to the proviso contained in said acts, to wit: "That if the said original *bona fide* stockholders should fail to pay into the treasury of said company 10% upon their said stock on or before the expiration of the extension of time provided in this act for railway companies to fulfill their charter obligations to the State,
120 then and in that case said stockholders shall forfeit all their rights, privileges, and property interest as stockholders in said road.

Given under my hand and seal—using scroll for seal, the company having no seal—at Houston, this Nov. 25th, 1862.

(Signed) JAMES F. LOUDON, *Secretary.*

The above and foregoing is a true and correct copy of the resolution as it appears on the minutes of the Houston and Texas Central Railway Company, pages 30 and 31.

(Signed) J. C. KIDD.

Deposition of J. C. Kidd Continued.

Witness answers that so far as he was aware all the stock that was reinstated in compliance with the terms of the resolution has been treated as valid, and all the holders of same so desiring voted at subsequent meetings, so far as he is aware, and he makes this answer from an examination of the minutes of the company.

Witness further stated that he was not aware that the railway or

any of its directors denied or in any way attempted to deny to stockholders any of their rights under the law restoring them, but, from an examination of the minutes of the company, judges that they were fully recognized in all their rights. His opportunities for knowing *is* an examination of the minutes and stock book of the company.

Witness stated, in answer to the first cross-interrogatory, that James F. Loudon, secretary, is dead, and that he judges the resolution to be his handwriting. The book is in his custody. Witness further stated that he had been in the employ of the Houston and Texas Central Railway Company, and subsequently of its receiver, in the accounting department since April 6, 1876, in the capacity of chief freight clerk, chief accountant, and assistant auditor.
121 From April, 1870, to 1876, was directly connected with the road.

In answer to the 5th cross-interrogatory, witness stated that he had not been able to find on file at this time any acknowledgment of the receiver by the governor of the resolution, nor *in* letter book showing a copy of any letter or communication by the company or its agents to the governor that such resolution had been forwarded to him.

Evidence of Completion of Railroad.

Defendants introduced evidence showing completion of road to Richland creek September 26th, 1871, and to Bryan August 27th, 1867.

Agreement as to Special Laws, Charters, etc.

It is further understood and hereby agreed by and between the parties that any and all of the charters of the said railway company and any and all the general and special laws pertaining to grants of lands to railway companies may be referred to and read to the appellate court without being transcribed at length herein. This also embraces extracts from house and senate journal of the State legislature.

Letter from Gov. Davis to Com. Keuchler.

Defendants introduced in evidence a certified copy of a letter from Gov. Davis as follows:

GOVERNOR'S OFFICE, AUSTIN, *July 19th*, 1872.

SIR: I have not heretofore had time to reply to your communication of 6th inst. in regard to the issue of land certificates to the two branches of the H. & T. C. R. R.

I am of the opinion that the decision of the supreme court in the H. & G. N. R. R. case covers substantially the abstract right
122 of the former railway, and I am not prepared to say that this company should be required to commence suit to enforce that right.

At the same time, I am inclined to believe that the company can only legally charge U. S. currency for freight and passage.

That we should withhold from them, however, what is legally theirs, so as to compel them to originate a suit which should properly be initiated by the State to enforce a forfeiture, is a further question, touching which I am, to say the least, in grave doubt.

Very respectfully, EDMOND J. DAVIS, *Governor.*

Hon. Jacob Keuchler, commissioner general land office, Austin Texas.

Defendants rested their case.

Deposition of Geo. W. Smith.

Plaintiff introduced the answer of Geo. W. Smith, secretary of state, in reply to a question asked by defendants if a certain resolution of the Houston and Texas Central Railway Company restoring certain stockholders to their original rights, as provided by section 4 of the act entitled "An act for the relief of railway companies," could be found by an examination of the records of his office and whether or not the same was now on file therein; to which he replied that no such resolution had been found among the records and archives of his office, and that he had caused repeated and diligent searches to be made for the resolution.

123 *Deposition of W. L. McGaughey.*

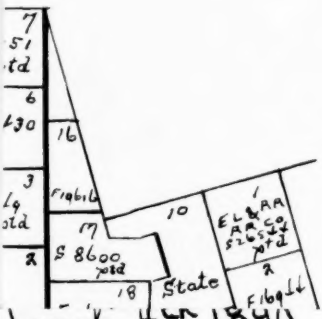
The plaintiff offered in evidence the answer of W. L. McGaughey to cross-interrogatory No. 2 of the deposition taken on the 5th day of September, 1892, which is as follows:

Second cross-interrogatory. "It is not true that on July 1, 1872 the defendant company received its first certificates for sidings (from certificates 27/1601 to 34/3596) 110.78 miles of main track and 7.72 miles of sidings, in all 118.5, to Corsicana? If you say that such fact is shown by the records of the land office, then please state what sidings—that is, sidings at what place—are included in the above issue of certificates from No. 27/1601 to 34/3496? Please make a careful examination and obtain these facts from the records." To which interrogatory the witness answers, "Yes; I can not state the particular places where sidings are located, for the reason that the engineer's report on that section of the road is not on file in this office."

Deposition of Gov. Lubbock.

Plaintiff then offered the answer of Governor Lubbock, who was governor of Texas in 1862–'63, to the effect that he has no recollection whatever of ever receiving such a resolution as that mentioned in the act of January 11, 1862, known as an act for the relief of railroad companies.

15040



March 4th 1890.

Office do hereby
from the maps

my hand
affixed the day

Hall.
Commissioner.

File Made by R. M. Elgin Again Introduced.

Plaintiff again introduced the file made by R. M. Elgin, land agent of the Houston and Texas Central Railway Company, and filed on the 28th day of July, 1872. The file is copied in full in the previous part of this statement of facts.

124 *Certificate of Commissioner of Land Office.*

Plaintiff then offered in evidence the certificates of the commissioner of the land office that the certificates named in this suit, which by number show that they are the certificates in the suit located in Nolan county, issued to the Houston and Texas Central Railway Company.

It is agreed by and between the parties that the foregoing contains all the material evidence and facts introduced on the trial of the above stated cause.

C. A. CULBERSON,
Attorney General, and
FRANK ANDREWS, *Att'y,*
For the State of Texas.
T. D. COBBS,
Attorney for Defendants.

The court, having examined the foregoing agreed statement of facts, hereby, in all respects, approved the same.

WM. KENNEDY,
Judge 32nd Judicial District.

Endorsed as follows, to wit:
Agreed statement of facts. Filed May 1st, 1893. John C. Cox, clerk district court, Nolan county, Texas.

(The map next following appears at a similar position in the transcript in the court of civil appeals. W. L. Huff, clerk.)

(Here follows map marked p. 125.)

126 *Appeal Bond.*

Filed May 8, 1893.

THE STATE OF TEXAS
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, FREDERICK P. OLCOTT, and GEORGE E. DOWNS. } No. 269.

Whereas in a proceeding had in the district court of Nolan county, Texas, cause No. 269, in which the State of Texas brought suit in trespass to try title and for the recovery of certain lands hereinafter

described, as plaintiff, against The Houston and Texas Central Railway Company, Frederick P. Olcott, and George E. Downs, as defendants; and whereas said cause coming on to be heard before the court at the April term, A. D. 1893, of said court; and whereas on the 19th day of April, 1893, the court, having taken the same under advisement, heretofore pronounced a judgment in favor of the plaintiff on said day for the land sued for; which said judgment so pronounced by the said court is as follows, to wit:

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILWAY Company, Frederick P. Olcott, and Geo. E. Downs.

No. 269. April 19th, 1893. Judgment of Court.

On this the 19th day of April, 1893, this cause came on to be heard and the plaintiff, The State of Texas, appearing by her att'y general, C. A. Culberson, and the defendants appearing by attorney, when came on to be heard the plea of the defendant- to the jurisdiction of this court and the plea of defendant-, and the same, having been submitted and being duly considered, was overruled by the court; to which ruling defendant- except that there
127 was a want of necessary parties, and that Chas. Dillingham, as receiver of The H. & T. C. R'y Co., defendant, was a necessary party to this suit, and praying that the court abate this suit, and said plea, being duly considered by the court, is in all things overruled; to which judgment the defendant excepts. Then came on to be heard the defendants' exceptions to plaintiff's original petition No. 1, 2, 3, and 4. The same being duly considered by the court, same are each in all things overruled; to which judgment the defendants excepts; whereupon came on to be heard the disclaimer herein filed by George E. Downs, one of the defendants in this suit, disclaiming title or right or possession to any of the lands sued for, and the court, after considering same, is of opinion that said Geo. E. Downs should go hence without day and recover his cost in this behalf expended, and — is so ordered. Then this cause being called for trial *was* on its merits, all parties, both plaintiff and defendant-, having announced ready, when came said parties, by their attorneys, and submitted the matters in controversy, as well *as* of facts — of law, to the court; and the pleadings, evidence, and argument of counsel for all parties having been fully heard and understood by the court, it is the opinion of the court that the plaintiff, The State of Texas, should recover judgment. It is therefore ordered, adjudged, and decreed by the court that The State of Texas, plaintiff, do have and recover of the defendants The Houston and Texas Central Railway Company and Frederick P. Olcott the lands, to wit:

Sixteen sections of lands of 640 acres each, situated and lying in Nolan county, Texas, in that certain block of Houston & Texas Central Railway surveys known as block No. 64, all of which are more particularly described and designated by the following tabulated statement showing block, survey and certificate number, and number of acres and where located, to wit:

128

No. certificate.	Date of certificate.	To whom issued.	Survey No.	No. block.	No. acres.	In what county located.
38/4438	July 1st, 1872	H. & T. C. R'y Co.	169	64	640	Nolan.
38/4443	"	" "	191	"	640	"
40/4997	"	" "	199	"	640	"
40/4998	"	" "	201	"	640	"
40/4999	"	" "	203	"	640	"
40/5001	"	" "	207	"	640	"
40/5002	"	" "	209	"	640	"
40/5003	"	" "	211	"	640	"
40/5004	"	" "	213	"	640	"
40/5005	"	" "	215	"	640	"
40/5006	"	" "	217	"	640	"
40/5019	"	" "	243	"	640	"
40/5020	"	" "	245	"	640	"
40/5021	"	" "	247	"	640	"
40/5022	"	" "	249	"	640	"
40/5023	"	" "	251	"	640	"

It is further ordered, adjudged, and decreed by the court that said plaintiff, The State of Texas, do recover of said defendants the possession of said land hereinbefore described, and that the said certificates upon and by virtue of which said lands were located by said defendant railway company as hereinbefore described are wholly void, and that same are hereby cancelled and held for naught, and that the clouds cast upon the title of plaintiff to aforesaid lands by the location and survey of said certificates is hereby removed, and that plaintiff recover of said defendants, jointly and severally, all cost in this behalf expended; to which judgment the defendants except.

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL R'Y CO., FRED. P. OLCOTT, *et al.* } No. 269.

APRIL 19TH, 1893.

On this the 19th day of April, 1893, came on to be heard defendants' motion to set aside the decree of the court rendered in this cause on this date, and to grant to defendants a new trial.

129 Both parties appearing by attorneys and the court, having heard and considered said motion, as well as argument of counsel, is of opinion that the law is against said motion. It is therefore ordered, adjudged, and decreed by the court that the said motion be, and the same is hereby, in all things overruled; to which ruling of the court the defendants except and give notice of appeal in open court to the court of civil appeals, 2nd supreme district of Texas, and the parties in this cause are given ten days after adjournment of this court in which to file their statement of facts.

From which judgment in favor of the State of Texas the said Houston and Texas Central Railway Company and Frederick P.

Olcott have taken an appeal to the court of civil appeals of the State of Texas for the second supreme judicial district in the city of Ft. Worth, in the county of Tarrant; and whereas the clerk of said court has fixed the probable amount of costs of the court of civil appeals, supreme court, and the court below at the sum of five hundred ($500) dollars:

Now, therefore, we, the Houston and Texas Central Railway Company and F. P. Olcott, as principals, Wm. D. Cleveland and C. Lombardi, as sureties, acknowledge ourselves bound to pay the State of Texas the sum of one thousand ($1,000) dollars, the same being double the probable amount of costs of said courts so fixed by the said clerk, conditioned that said Houston and Texas Central Railway Company and said Frederick P. Olcott, appellants, shall prosecute their appeal with effect and shall pay all the costs which have accrued in the court below and which may accrue in the court of civil appeals and the supreme court.

Witness our hands this the 28th day of April, A. D. 1893.

HOUSTON AND TEXAS CENTRAL
RAILWAY COMPANY AND
F. P. OLCOTT,
By T. D. COBBS, *Att'y.*
WM. D. CLEVELAND.
C. LOMBARDI.

130 Approved:

JOHN C. COX,
Clerk District Court, Nolan County, Texas.

THE STATE OF TEXAS, }
County of Harris. }

I, J. R. Warters, clerk of the district court in and for said county, do hereby certify that Wm. D. Cleveland and C. Lombardy, whose names appear signed to the annexed bond, are in my opinion good and ample security for the amount therein specified; that they have property in said county subject to execution of a larger amount, and that if said bond was offered to me for approval the same would be accepted and approved.

Witness my hand and seal of office, at Houston, Texas, this 28th day of April, 1893.

J. R. WARTERS,
Clerk District Court, Harris County.

I fix the amount of probable — at $500.00.

JOHN C. COX,
Clerk District Court, Nolan County, Texas.

Endorsed as follows, to wit:
Appeal bond. Filed May 8, 1893.

131 *Assignment of Errors.*

Filed May 8, 1893.

THE STATE OF TEXAS
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.*

No. 269. Pending in the District Court of Nolan County, Texas.

And now come the defendants and make the following assignment of errors, to wit:

I.

The court erred in overruling defendants' plea to the jurisdiction of said court to try said cause, because it was shown that all of the property of the Houston and Texas Central Railway Company, including the lands sued for, were in the hands of Charles Dillingham as receiver thereof, appointed under orders and decrees of the United States circuit court in consolidated cause No. 198, Nelson S. Easton *et al.*, trustees, *vs.* The Houston and Texas Central Railway Company *et al.*, pending long prior to the institution of this suit in the United States circuit court for the eastern district of Texas, at Galveston, and that this said cause was instituted without permission of said United States circuit court or any of the judges thereof.

II.

The court erred in overruling defendants' plea that there was a want of necessary parties to the suit, because it was shown that Charles Dillingham was receiver and in possession of the property sued for prior to the institution of said suit by virtue of an appointment made in consolidated cause No. 198, Nelson S. Easton *et al. vs.* The Houston and Texas Central Railway Company *et al.*, pending in the United States circuit court for the eastern district of Texas, at Galveston, and by virtue of such appointment was in
132 possession of said property under the orders and decrees of said United States circuit court, and so being in the possession of said property at the institution of said suit and at the final trial of said cause was therefore a necessary party to the suit.

III.

The court erred in overruling defendants' first exception, the same being the general exception and calls into question the sufficiency of the petition and raises the question as to whether or not the allegations of same would entitle the plaintiff to recover at all, and especially upon any of the allegations upon which the suit was instituted.

IV.

The court erred in overruling paragraph 4 of defendants' exceptions, because said petition failed to affirmatively allege and show that the att'y general of the State of Texas was authorized to insti-

tute the suit, and had authority to do so, either under the law of the State or was properly directed to do so by the State of Texas; and the court therefore erred in overruling the exception, to the extent that the plaintiff was not required to specially state in the face of the petition what, if any, authority the att'y general had for the institution of the suit; and the court erred in not requiring the att'y general, upon the demand of the defendants, to allege or show what the authority was, whether written or verbal, general or special.

V.

The court erred in not finding as a matter of fact that the land sued for, although embraced in what is generally known as the Texas & Pacific reservation, that prior to the passage of said
133 act that the same were not affected by the said Pacific reservation, because on the 28th day of July, 1872, the Houston & Texas Central Railway Company made a valid file through the proper surveyor's district, which file was in force and effect prior to the creation of said reservation, and that the lands sued for by plaintiff were by the said railway company surveyed within the said file and within twelve months after the same had been made.

VI.

The court erred in its first conclusion of law in holding that the suit was brought for the sole purpose of determining the question of title to the lands in controversy between the State of Texas and the defendants, the said railway company and Olcott, and that the same could be maintained for said purpose, notwithstanding the fact that said railway company and lands in controversy are still in the custody of a receiver appointed by the Federal court, and that the suit was brought without the permission of the Federal court; and the court erred in this: that the suit being to recover the title of property, which property was in the hands of the receiver, and suit therefore against the corporation, which is in the hands of a receiver, with the property in possession of said receiver by reason of his appointment as such, is therefore a suit against the receiver, which could not be brought without the permission of the court in which the receivership was pending, the same not being in respect to any act or transaction of his in carrying on the business connected with such property.

VII.

The court erred in not holding that the law of January 11, 1862, and its acceptance by the Houston & Texas Central Railway
134 Company by the resolution passed by its board of directors November 5, 1862, restoring the stockholders to their original positions in the company, was a contract by and between the State of Texas and the Houston & Texas Central Railway Company which entitled said railway company to all the rights and benefits of the act of January 30, 1854, and the several amendments and supplements thereto, especially the right to the grants of land made

therein, and that the said contract could not be impaired by any subsequent act of the State without violating the Constitution of the United States, especially in violation of section 10, article 1, of said Constitution of the United States, and the constitution of the State of Texas.

VIII.

The court erred in holding that the special act of January 23, 1856, authorized the State to repeal the act of January 30, 1854, granting lands to railroads in so far as the same affected the Houston & Texas Central Railway Company.

IX.

The court erred in holding that the special act approved February 4, 1858, in so far as the same could be held to grant lands to the Houston & Texas Central Railway Company, ceased to be operative at the time the act of January 30, 1854, granting lands to railroads, expired by limitation.

X.

The court erred in holding that the war between the States closed in Texas on the 28th day of May, 1865, when in truth and in fact the war closed in Texas August 20, 1866, as determined both by the supreme court of Texas in Grigsby *vs.* Peake, 54 Texas, page 149, and Supreme Court of the United States in Freeborne *vs.*
135 The Protector, 12 Wallace, 702, and that the court's conclusion was also erroneous as to when the said act of January 30, 1854, expired and ceased to be in force and effect.

XI.

The court erred in holding that the act approved November 13, 1866, is in conflict with the constitution of 1866 and previous constitutions of the State, and that the same was null and void, because the said law was valid and has been so held to be both by the decisions of the supreme court of Texas and the Supreme Court of the United States, and was a lawful and valid act.

XII.

The court erred in holding that the Houston & Texas Central Railway Company could not claim lands under the special act of September 21, 1866, granting sixteen sections of land to the mile of completed track, for the reason, as found by the court, that it failed to comply with the provisions of that act, and that it should build fifty miles of road within two years from January 1, 1867, and seventy-five miles within three years from that date, and for that reason the company had lost the right to earn lands under that act, when in truth and in fact the railway company had not forfeited any right to earn lands and did earn the land within the time prescribed by law, and if the said railway company failed to build the fifty miles

within two years from January 1st, 1867, the said railway company was relieved of said failure to complete its road for the reason that the State of Texas waived all claims to the lands by extending the time, and for the further reason that the said State of Texas never undertook to assert any forfeiture, and that the completion of said railway within the stated period was not a condition precedent.

136 XIII.

The court erred in inquiring into and holding that the said railway company or any part of it was not completed within the time and manner required by law, for this, that the executive of the State of Texas was under the law charged with that duty, and, having passed upon the same and certificates having been issued to the said railway company in pursuance of such findings of the governor, his acts were final and conclusive, and this court has no authority whatever in law to go beyond the action of the executive, whose duty it was to pass upon these questions, and his action in the premises was final.

XIV.

The court erred in holding that the act of August 15, 1870, enacted after the adoption of the constitution of 1869, which repealed the act of September 30, 1854, was in conflict with that constitution and therefore null and void, for this, that the constitution of 1869 did not relate to nor affect the rights of the Houston and Texas Central Railway Company to earn lands. The said constitution of 1869 by its very terms did not undertake to impair any existing right to earn lands, but, on the contrary, the same preserved the prior and existing rights, and therefore, the Houston and Texas Central Railway Company having at the adoption of the constitution of 1869 a prior existing right, the law of August 16, 1870, was not in conflict with the constitution of 1869 and was a valid law, and all rights of the Houston and Texas Central Railway Company were protected under said law of 1870, and also by reason of the provisions of the constitution of 1869, and the same were continued in force and effect.

137 XV.

The court erred in holding that the defendant F. P. Olcott, having taken title under the certificates, was affected with notice of their invalidity under the constitution of 1869, in this, that the said F. P. Olcott was the purchaser of said land under and by virtue of the foreclosure of mortgages, which had been executed by the railway company under legislative sanction; that the Houston and Texas Central Railway Company was a corporation duly organized under the laws of the State of Texas prior to the act of January 30, 1854. There was nothing in the face of the certificate nor elsewhere to put the said Olcott upon any notice whatever that there was any defect in his title; but, on the contrary, the action of the State of Texas and her officers in permitting said lands to be surveyed and

recognized in the land office as the lands of the railway company, to be mapped and platted therein as lands of the railway company, taxes paid and received on the same as lands of the railway company, and patenting other lands by virtue of same series and issue of certificates was such as to lead the said Olcott to believe that the State of Texas, if it had any claim, had waived the same.

XVI.

The court erred in holding that *under* the special act entitled "An act granting lands to the Houston and Texas Central Railway Company," approved September 21, 1866, superseded the act of January 30, 1854, and no portion of such railway had the right to a land grant from the State, and after the passage of said special acts said company could only acquire lands from the State under the provisions thereof. There was nothing in either the said act of September 21, 1866, or the said act of November 13, 1866, which denied to the Houston and Texas Central Railway Company
138 any of the rights, privileges, and grants which are made in said latter act.

XVII.

The court erred in not holding under the law of January 30, 1854, and the several amendments and supplements thereto, and the said act of January 11, 1862, extending the said act, and the several laws passed by the legislature of 1866, and the provisions of the constitution of 1869, and the ordinances of the convention adopting the said constitution in relation not only to land grants, but also to the suspension of the statutes of limitation until March 30, 1870, extended the operation of the act of January 30, 1854, irrespective of either of the law of September 21, 1866, or of November 13, 1866, and that the said provisions of the constitution of 1869 and the ordinance of said convention as to setting the operation of the laws of statutes of limitation gave the Houston and Texas Central Railway Company all the rights, benefits, and grants preserved by said act of January 30, 1854, including the right to grants of land for necessary sidings and turnouts until March 30, 1870.

XVIII.

The court erred in going behind the certificates issued to the Houston and Texas Central Railway Company for the purpose of inquiring into the time when the road was completed to certain stated points, because the governor, who appointed the engineer to inspect the road when completed and to report upon the same, was by the law constituted the sole and final judge of whether or not the necessary antecedent acts had been done and performed, and the decision that the railway company had done and performed the conditions precedent to its right to acquire lands, as evidenced by the certificates of the land commissioner and the patents
139 issued thereupon, are conclusive and final, and there being no allegations in said petition which would authorize the court

to review the act and the conclusion of the constituted officers under the provisions of the law.

XIX.

The court erred in not holding that if there was doubt under the law as to whether or not the said railway company was entitled to said lands that the construction placed upon said law by the executive departments would be conclusive and binding and ought not to be disturbed, and by reason of such executive construction that the said railway company was entitled to the said land; that the same became a rule of property as to land granted and ought not now to be disturbed.

XX.

The following uncontroverted facts being in evidence, to wit, that all lands granted to said railway company were duly surveyed and returned, as the law required; field-notes returned to the general land office; maps, plats, and sketches duly made and used as archives in the land office and in the counties in which the lands are situated upon which was endorsed, "The lands of the Houston and Texas Central Railway Company," and so recognized as its lands; the executive construction placed upon the same; that the same were by legislative permission and authority mortgaged for the purpose of construction; taxes regularly paid thereon; finally foreclosed and purchased by F. P. Olcott, it was therefore error in not holding by reason of such facts that the State was estopped by her own laches from setting up any claim whatever for the lands sued for, and that the same is a stale demand, and that said facts and said acquiescence on the part of the State and her laches
140 for so long a time constituted a waiver upon the part of the State to any claim, if any she had, in and to such land.

XXI.

The court erred in not holding that by reason of the charter to said railway company and the several acts amendatory thereof and supplements thereto, and the right to build the road to the city of Austin, granted to it by the legislature, and the decision in the case of Railway *vs.* Commissioner, 36 Texas, 383; Davis *vs.* Gray, 16 Wallace, 203; G. H. & S. A. R'y *vs.* State, 81 Texas, 573, and the executive construction as to the right to acquire lands for the period of thirty years—executive, judicial, and legislative construction placed upon said charters and laws of this State established a rule of property, how a property right of defendant and their deprivation of said property through a new rule and through a new construction of said laws would be the taking of their property without due process of law and constitutes the impairment of a contract entered into between the State of Texas, on the one side, and the said railway company, through the charter and legislation had in this State, on the other side, in violation of the Constitution of the United States, particularly 10th section of the first article and the 14th article of amendments thereof.

XXII.

The court erred, upon the motion of the State of Texas, in striking out the answers of C. C. Gibbs to interrogatories 4, 5, and 6 and exhibits thereto, as shown by bill of exceptions No. (1) one, because the said testimony was offered under the allegations of its answer, not excepted to, for the purpose of showing that the defendant company had lost, by reason of adverse location and by reason of
141 the Pacific reservation, more lands than it had received from the State of Texas under and by virtue of the same issued for sidings, in case the court should hold that the said railway company was not entitled to certificates for sidings upon that part of the road for which certificates involved in this suit were issued; and the court also erred in striking out the answers of George W. Polk, a witness for defendants, to the same interrogatories, as appears from bill of exceptions No. 2, offered for the same reason.

XXIII.

The court erred in overruling defendants' motion for a new trial upon the grounds set forth therein, the first ground being that the said suit was instituted against the property of the Houston and Texas Central Railway Company, which was then in the hands of a receiver appointed by the United States circuit court, who was in possession of the property, and that the plaintiff brought the suit in violation of the comity existing between courts of concurrent jurisdiction without asking the permission of the said court where the receivership was pending to sue for the property, which was by law in the possession of the receiver, the second ground being that the evidence showed upon the plea of defendants that Charles Dillingham was receiver of all the property of the Houston and Texas Central Railway Company, and was in possession of the land sued for by virtue of such orders and decrees, and that the law requires suits to be brought against parties in possession and claiming the property. The other grounds referred to in the motion for a new trial are fully set forth more specifically in the foregoing assignments.

All of which assignments of error are respectfully submitted.

T. D. COBBS,
Attorney for Defendants.

142 Endorsed as follows, to wit:

Assignment of errors. Filed May 8th, 1893. John C. Cox, clerk of the district court, Nolan county, Texas.

Bill of Costs.

THE STATE OF TEXAS:

THE STATE OF TEXAS, Plaintiff,
vs.
HOUSTON & TEXAS CENTRAL R'Y CO., Defendant. } No. 269.

M-. —— to officers of court, Dr.

Clerk's Fees.

	Plaintiff.	Defendant.
Docketing cause	20	
2 citations	1 50	
2 cert. copies petition	10 00	
Notice filing papers (Geo. E. Downs)	75	
" " " F. P. Olcott	75	
5 continuances, .20	1 00	
2 notices filing papers, to F. P. Olcott and C. A. Culberson	75 75	
2 orders of court	1 50	
1 " " jurisdiction	75	
Judgment of the court	1 50	
Order of court, new trial	75	
Filing 27 papers	4 05	
Total clerk fees	$24 25	

Sheriff's Fees.

R. E. White, Travis Co.	1 10	
Jury tax, J. F. Newman	50	
Total sheriff's	$1 60	
Joseph B. Brannon, New York, serving defendants Olcott and Downs	25 00	
Deposition fees	17 50	
Clerk's fees, orig. cost	24 25	
Transcript, 49,000 words	98 00	
	$166 35	

143 THE STATE OF TEXAS, }
County of Nolan. }

I, John C. Cox, clerk of the district court in and for said county and State, hereby certify the above to be a correct account of the costs chargeable to the defendants in above entitled and numbered suit up to this date.

Given under my hand and seal of office, at Sweetwater, this 21st day of July, A. D. 1893.

JOHN C. COX.
Clerk District Court, Nolan Co., Texas.

District Clerk's Certificate.

THE STATE OF TEXAS, }
County of Nolan. }

I, John C. Cox, clerk of the district court in and for Nolan county, Texas, do hereby certify that the foregoing transcript, consisting of 154 pages, contains a true copy of all the proceedings had and done in the said district court in cause No. 269, The State of Texas *vs.* Houston and Texas Central Railway Company, Frederick P. Olcott, and Geo. E. Downs; an assignment of errors, and a true certified bill of costs.

Given under my official signature and seal of said district court this the 24th day of July, 1893.

[L. S.]

JOHN C. COX,
Clerk District Court, Nolan County, Texas.

144 *Indorsements on Transcript from District Court.*

The entire record from the district court of Nolan county is indorsed as follows:

No. 1525. Houston and Texas Central Railway Co. *et al.*, appellants, *vs.* The State of Texas, appellee. From Nolan county.

Applied for by T. D. Cobbs, attorney for def'ts, on the 18th day of May, A. D. 1893. Delivered to J. H. Beall, att'y, on letter of said T. D. Cobb, on the 24th day of July, A. D. 1893. J. C. Cox, clerk district court, Nolan county.

Filed in the court of civil appeals, at Fort Worth, the 26th day of July, A. D. 1893. W. L. Huff, clerk.

Order of Submission in Court of Civil Appeals.

H. & T. C. R'y Co. *et al.* }
vs. } 1525.
THE STATE OF TEXAS. }

Nov. 28, 1894.

Submitted on briefs and argument of both parties.

Opinion of the Court of Civil Appeals.

HOUSTON & TEXAS CENTRAL RAILWAY CO. *et al.*, Appellants, }
vs. } No. 1525.
THE STATE OF TEXAS, Appellee. }

Opinion.

This appeal is from a judgment rendered April 19, 1893, in favor of the State of Texas, for sixteen sections of land in Nolan county,

the suit having been brought in the name of the State by
145 the attorney general February 3, 1890. The trial was had without a jury, and the judgment rests upon concisely stated conclusions of facts, which we adopt.

Since the trial many of the important questions of law involved have been determined by our supreme court in the following recent cases: H. & T. C. R'y *v.* State, Quinlan *v.* H. & T. C. R'y, and G., H. & S. A. R'y *v.* State, all reported in 34 S. W. Rep., pages 734, 738, and 746. We need not discuss the questions so fully considered in these cases, but proceed at once to consider the additional or peculiar features of the case at bar.

The Washington County Railroad Company was chartered in 1856 to construct and operate a railroad from a point on the Galveston & Red River railway (the name of which was changed that year to the Houston & Texas Central) to Brenham, which it did, beginning at Hempstead. Of this line of road the Houston & Texas Central Railway Company afterwards became the owner by purchase under mortgage foreclosure, and by special act of the legislature passed August 15, 1870, the Washington County Railroad Company was merged in the Houston & Texas Central and the latter authorized to extend that road from Brenham to Austin, which it did between the date of the special act and the 25th day of December, 1871; in consideration of which extension land certificates were issued to it in 1872 and located on the lands in controversy in June, 1873, within what had then just become the Texas & Pacific reserve, as provided in a special act of May 2, 1873. In the preceding July, however, a sort of blanket file seems to have been made or attempted in behalf of the H. & T. C. Company by virtue of these certificates on a large body of land, including that in controversy, but without the application of any particular certificate to any particular section of land. Nothing further seems to
have been done in pursuance of this file till the locations
146 were made in June of the succeeding year. It was expressly provided in the face of these certificates that they were to be located only on "unreserved" public domain. No patents have ever issued.

The questions thus arising are: Were the certificates valid? If so, were the locations valid?

We are of opinion that the first, if not the second, question should be answered in the negative. The constitution of 1869 (art. 10, sec. 6) stood in the way of any grant of lands to railroads when the act of August 15, 1870, which authorized the extension of the old Washington County railroad from Brenham to Austin, was passed. Whatever new power this act attempted to confer upon the Houston & Texas Central Company to acquire land by building the road to Austin was withheld by the clause of the constitution referred to. G., H. & S. A. R'y *v.* State, 34 S. W. Rep., 749.

Did the power exist independent of the act of 1870? The old Galveston & Red River Company (now the Houston & Texas Central) had the right under its charter (granted in 1848) not only to construct its main line, but also "simultaneously" therewith "a

branch towards the city of Austin," besides general branching privileges. In accepting the benefits of a supplementary special act for its relief it was required to yield "all general branching privileges except such as are expressly granted by the provisions of its charter to certain points." It is claimed that it thus acquired not only the right to build the road from Brenham to Austin, as one of its branches "to certain points," but also the right to have sixteen sections of land to the mile for so building it, under the general law on that subject as passed in 1854 and extended for ten years in 1866. But this general law expressly denied to such companies (entitled to eight sections per mile) taking the benefits thereof the right "to receive any grant of land for any branch road." While the
147 privilege of building a branch towards or to Austin may have been retained, the further right to acquire sixteen sections of land for every mile of such branch road was not. It follows, we think, that the certificates in question were issued without authority, and hence did not authorize the appropriation of any part of the public lands.

But should this conclusion prove erroneous we are still not prepared to hold that the second question would admit of any other than a negative answer, though we do not find it necessary at this time to so decide. Jumbo Co. *v.* Bacon & Graves, 79 Texas, 5.

The judgment is affirmed.

STEPHENS,
Associate Justice.

Filed May 9, 1896.

Judgment of Court of Civil Appeals.

H. & T. C. R'y Co. *vs.* The State of Texas. } 1525. From Dist. Court, Nolan Co., May 9, 1896. Opinion by Mr. Stephens, A. J.

This cause came on to be heard on a transcript of the record, and the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is therefore considered, and so ordered, adjudged, and decreed, that the judgment of the court below be in all things affirmed; that the appellants The Houston & Texas Central Railway Co. and F. P. Olcott and their sureties, Wm. D. Cleveland and C. Lombardi, pay all costs in this behalf expended, and that this decision be certified below for observance.

148 *Motion for Rehearing.*

In the Court of Civil Appeals, Second Supreme Judicial District.

Houston and Texas Central Railway Company *et al.*, Appellants, *vs.* The State of Texas, Appellee. } No. 1525.

Now comes the appellant- in the above-styled cause, by *its* attorney, and moves the court to set aside the judgment rendered on the

9th day of May, 1896, in this cause affirming the judgment of the court below in the above-stated cause, and for grounds for a rehearing submit the following:

First.

The court erred in not considering and in effect overruling appellants' first assignment of error, to the effect that the court below erred in overruling the appellants' plea to the jurisdiction of the district court to try said cause, because it was shown that all the property of the Houston & Texas Central Railway Company, including the land sued for, was in the hands of Charles Dillingham, as receiver thereof, appointed under the orders and decrees of the United States circuit court in consolidated cause 198, entitled Nelson S. Easton *et al.*, trustees, *vs.* The Houston and Texas Central Railway Company *et al.*, pending long prior to the institution of this suit in the United States circuit court for the eastern district of Texas, at Galveston, and that said cause was instituted without permission of said United States circuit court or any of the judges thereof, because the said Charles Dillingham, as receiver of the properties of said railway company, was in possession of said property as receiver thereof and was so placed in possession by the order and decree of the said United States circuit court. The
149 facts in the case and the findings of the court below showed that the said receiver was in possession of the land sued for as receiver of said United States circuit court.

Second.

The court erred in not passing upon and considering appellants' first and second assignments of error and in effect overruling the same, because the assignments raised the question of want of proper parties to the suit, it being shown that Charles Dillingham, receiver, was in possession of the property sued for prior to the institution of said suit by virtue of an appointment made in consolidated cause # 198, entitled "Nelson S. Easton *et al.*, trustees, *vs.* The Houston and Texas Central Railway Company *et al.*," pending in the United States circuit court for the eastern district of Texas, at Galveston, and by virtue of which appointment his possession was extended to and included, under the order of said United States circuit court, the land sued for in this suit, and so being in the possession of said property at the institution of said suit and at the final trial of said cause, he was therefore a necessary party to the suit, and — the failure to sue the said Dillingham on account of his said possession and the holding of the court as in said assignment of error shown the failure of this court to pass upon the same was error, and for which error the appellants now here request the same to be reviewed.

Third.

The court erred in not passing upon and sustaining the third assignment of error, the effect being virtually to overrule defendant's exception to plaintiff's petition, the assignment of error bring-

ing into question the sufficiency of plaintiff's petition and raised the question as to whether or not the allegations of same
150 would entitle plaintiff to recover the land sued for upon any ground alleged in plaintiff's petition, and because the said petition did not show wherein the railway company was not entitled to certificates for sidings or otherwise invalid, and because the petition showed upon its face that at the time the certificates were issued there was no prohibition in the constitution or laws of the State of Texas denying to the defendant the right to receive the certificates, and the said petition nowhere by any sufficient allegation negatived the right of appellant under its charter and other laws of the State of Texas authorizing the same, and nowhere showed that the said certificates so issued to the said railway company were invalid or were unlawfully issued to it.

Fourth.

The court erred in not passing upon appellants' fourth assignment of error, which raised the question as to the right of the attorney general of the State of Texas to institute the suit without direct authority from the executive department, there being no law in existence or in force at the time which would authorize the attorney general, upon his own motion, to institute a suit for the recovery of land or for the cancellation of land certificates or patents to land; and the court further erred in not considering the question raised in said assignment calling into question the right of plaintiff to prosecute the said suit upon exceptions thereto without allegations in the petition alleging that the attorney general was authorized to institute the suit, and in not requiring the attorney general, upon the demand of appellants, to allege and show what the authority, if any, was, whether written or verbal, general or special, that authorized the institution of said suit.

151 Fifth.

The court erred in overruling and in effect holding not well taken appellants' 5th assignment of error, to the effect that the land- sued for, although embraced in what is generally known as the "Texas and Pacific reservation," were not located by virtue of a valid file, and in holding that "a sort of blanket file seems to have been made or attempted in behalf of the Houston & Texas Central Railway Company by virtue of these certificates on a large body of land, including that in controversy, but without the application of any particular certificates to any particular section of land." Nothing further seems to have been done in pursuance of this file until the locations were made in June of the succeeding year.

The evidence introduced on the trial of said cause does not support the conclusion of this honorable court upon that point, because on the 28th day of July, 1872, the Houston & Texas Central Railway Company made a valid file through the proper surveyor's district, which file was in force and effect prior to the creation of said reservation, and that the lands sued for by plaintiff were by the said

railway company surveyed within the said file and within twelve months after the same had been made. See the file made through Robert Elgin, the land agent, and filed in the office of the county surveyor on the 28th day of July, 1872, to be found on Trans., p. 104 and 105; also see the map introduced by agreement of parties, showing the tracings of the file upon the land, and which shows all the land sued for, except survey numbers 160 and 191, by virtue of certificate Nos. 38–4438, 38–4443, embraced within the boundaries thereof. The file was not a blanket file, as called by this honorable court, but was such a file as was authorized to be made, and the particular certificates for which the particular sections of land were surveyed are included in and embraced within the particular
152 file. By comparing the certificates numbers with the certificate numbers embraced within the file and the survey number given, the court will see that it has made a very serious error in ruling that the certificates were not embraced in and that any particular certificate was not applied to any particular section of land.

The findings of fact nor the statement of fact will sustain the court in its conclusion, two of which sections only are not embraced within this file, to wit, surveys 169 and 191; and the court therefore erred in holding that the appellants had no valid file.

The case of Jumbo Company *vs.* Bacon & Graves, 79th Texas, is not authority in this, because, as will be shown, if the court will examine the record in the case of Bacon & Graves in vol. 2, court of civil appeals, p. 692, it will be observed that Bacon & Graves disclaim all interest in and to certain surveys made by the Houston & Texas Central Railway Company in block 97, where the said railway company had a prior file. For part of block 97 there was a file made in which the certificates were not applied to the file, and consequently the Bacon & Graves location was conceded to be superior to the railway company's surveys, unless the act of 1873 proved to be constitutional. Appellants contend that the very language of the act of 1873 recognize-, as shown in sections 5 and 6, that nothing contained in said act should be construed to impair or affect the rights of any person or persons thereto where legally acquired within said reservation.

So far as the act passed May 2, 1873, which was not approved by the governor, entitled "An act to adjust and define the rights of the Texas Pacific railway within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean," is concerned, the same is unconstitutional and void, in that from the caption of the one it purports merely to "adjust
153 and define the rights of the Texas Pacific railway within the State of Texas," and does not purport to nor contemplates granting land or creating reservations to entitle the Texas & Pacific to acquire and locate land; and section sixth of said act contemplates to grant by reservation a new and additional width of territory on each side of the 16 miles of reservation of the old Memphis, El Paso & Pacific Railroad Company reservation not there-fore granted. This will make 80 miles in width from the 23rd meridian

of longitude west to the east boundary line of New Mexico and to a point south of the southeast corner of said Territory of New Mexico—that is to say, taking the centre line of said Memphis-El Paso reservation and extending 40 miles on northern side thereof and after reaching the said point south of and opposite to the southeast corner of New Mexico to said reservation of the unappropriated public domain is hereby continued 80 miles in width, etc., extending westward to the Rio Grande and bounded on the north by New Mexico, the same to include the Memphis-El Paso reservation hereinbefore mentioned, which reservation as herein continued and set apart shall continue to be so reserved and set apart for the purpose herein mentioned until the year 1880 and no longer.

Section seven of said act requires the commissioner of the general land office to designate upon the maps of his office the said reservation.

Section II of said act as a condition precedent requires the Texas & Pacific Railway Company, by their board of directors, within fifteen days after the date of approval of the act, to signify to the governor by telegraph or otherwise the acceptance or rejection of the terms and conditions of the act, and within thirty days from the date of approval to file a formal acceptance or rejection of the same with the secretary of the State of Texas. The act was not approved by the governor. The evidence fails to show upon the part
154 of the State that any condition whatever required to be done if the act should be held to be a valid act was performed upon the part of the railroad company, and that the same became and was a completed contract, so that the reservation was in fact made for the benefit of the said Texas & Pacific Railroad Company.

As will be seen, the court therefore erred in holding in effect that said assignment of error was not well taken, and that said lands were located in the "Texas & Pacific reservation," and that appellants' rights to acquire the same were lost to it on account of the said reservation.

Sixth.

The court erred in not holding that the sixth assignment of error was well taken, which raises the question as to the right of the State of Texas to bring the suit for the recovery of land, which lands were in the possession and control of a receiver of a Federal court, acting under the decrees and order of the Federal court having the ultimate control and disposition of the land.

When the property and possession of said property was by virtue of the proceedings of the said United States circuit court drawn to the said United States circuit court the effect of the said proceedings — equivalent to a sequestration and was a proceeding *in rem*, and the property therefore, by virtue of said receivership, was in the possession and custody of the court. The suit was not one of that class of suits which would be authorized upon the ground that the same was "in respect to any act or transaction of his (receiver) in carrying on the business connected with such property," but was property and assets in the custody of the court, subject to the dis-

position of the court, subject to the lien impressed upon the property by the order and decrees of said court, and subject to the mortgage lien which was sought to be foreclosed in the Federal court,
155 the prayer of plaintiff being for judgment for possession of and title to the land, as well as for a decree cancelling the certificates; for a removal of cloud cast upon the State's title, for damages and costs. See Trans., pp. 6, 7–9, plaintiff's petition.

Seventh.

The court erred in not considering and in not holding as well taken appellants' assignment of error contained in the 7th assignment of error that the law of January 30, 1862, and its acceptance by the Houston & Texas Central railway by the resolutions passed by its board of directors November 5, 1862, restoring the stockholders to their original position in the company, was a contract by and between the State of Texas and the Houston & Texas Central Railway Company, which entitled said railway to all the rights and privileges of the act of January 30, 1854, and the several amendments and supplements thereto, especially the right to the grants of land made therein, and that the said contract could not be impaired by any subsequent act of the State without violating the Constitution of the United States, especially in violation of section 10, art. I, of the Constitution of the United States, and of the constitution of the State of Texas.

The said act of January 11, 1862, provided that the time of the continuance of the war between the Confederate States and the United States of America should not be computed against any internal improvement in reckoning the period allowed them for their charter by any law, general or special, for the completion of any work contracted by them to do. There were two laws passed upon the same day, and both of those laws provided as a condition precedent for the Houston & Texas Central Railway Company to receive the benefits of said act that the company should pass
156 a resolution restoring the original *bona fide* stockholders thereof, those having paid for their stock, to all the rights, privileges, and immunities to which they were entitled previous to and of which they were divested by the sale of the road to W. J. Hutchins *et al.* The railway company did pass the resolutions, and the original *bona fide* stockholders of said company who paid for their stock were restored to all of the rights and privileges to which they were entitled previous to the sale, and by virtue of which the said railway company became entitled to receive all of the benefits of the act of January 30, 1854, granting land to railroads in virtue of its charter and the other laws, general and special, of the State of Texas, and the right of the railway company became fixed to acquire these lands by the express contract so entered into by and between the State of Texas and the said railway company, for a valuable consideration, in addition to the considerations which the State received by reason of the construction of works of internal improvement.

Eighth.

The court erred to the effect in not holding that the 8th assignment of error was well taken, calling into question the action of the court below in holding that the said act of January 23, 1856, authorizing the State to repeal the act of January 30, 1854, granting lands to railroads in so far as the same affected the Houston & Texas Central Railway Company, because there was granted to the Houston & Texas Central Railway Company by virtue of the act approved February 14, 1852, by virtue of section 14 thereof, eight sections of land of 640 acres each for every mile of railway actually completed by it and ready for use; and further provided in said section that said certificates shall be for 640 acres each and located upon an unappropriated public domain in the State of Texas;
157 and it was further provided in section 17 of said act "that it shall be lawful for any of the railways hereafter to be constructed to cross the said railway or any branch thereof or to connect at any point therewith."

It was provided by an act approved February 7, 1857, entitled "An act supplemental to the acts to establish the Galveston & Red River Railway Company," authorizing it to make and construct, with the original railway described in said acts establishing said company, a branch thereof toward the city of Austin under the same restrictions and stipulations provided in said original acts and subject to the rights of the State to regulate the tolls by general law, that the act approved January 23, 1856, gave the Galveston & Red River railroad six months after the 30th day of January, 1856, to complete the first 25 miles of their road, commencing at the city of Houston, and provided also that the said company shall be entitled to the rights and benefits granted by an act approved January 30, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of land." The act further provided in section 1 that said company shall be required to complete the main trunk of said road to the 32nd degree of north latitude or until they shall connect with some road reaching to or in the vicinity of Red river before they shall commence any branch road; provided, further, that the act to regulate railroad companies, approved the 7th day of February, 1853, shall apply to this charter.

Section 3 of said act provided for the assignment of the land certificates to which the railroad company would be entitled, and section 4 thereof authorized the company to mortgage its land.

Section 5 thereof required the Galveston & Red River Railway Company to yield all general branch privileges except such as are specially granted by the provision of its charter to certain
158 points, and shall be required to spend only so much of its capital stock upon any branches as shall be expressly subscribed to such branches, and shall not expend upon its trunk any moneys subscribed to any branch, and shall be required to complete its main trunk on to the point on Red river contemplated in its charter or to such point or intersection between said road and some other road running from the northern or eastern boundary of Texas

toward El Paso as shall be agreed upon between the directors of said company.

Section 6 provides that nothing shall be construed in the application to affect the right of the State to appeal or modify the act of January 30, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of lands;" provided that the rights and lands acquired before said repeal or modification shall in all cases be protected.

By an act of February 1, 1856, the name of the Galveston & Red River Railway Company was changed to that of the Houston & Texas Central Railway Company. By an act of September 21, 1866, entitled "An act granting lands to the Houston & Texas Central Railway Company;" there was granted by section 1 thereof to the Houston & Texas Central Railway Company a grant of 16 sections of land of 640 acres each for every mile of road it has constructed or may construct and put in running order in accordance with the provisions of the charter of said railway company; provided that the lands heretofore drawn by the said company by virtue of an act entitled "An act to encourage the construction of railroads in Texas by donations of land," approved January 30, 1854, *to* be deducted from amounts of land granted hereby, and by virtue of an act approved November 13, 1866, entitled "An act for the benefit of railroad companies," it was provided that the grant of 16 sections of land to the mile of railroad companies heretofore or hereafter constructing railroads in Texas shall be extended
159 under the same restrictions and limitations herein provided by law for ten years after the passage of this act."

It is error, therefore, in not holding that the said assignment was not well taken, and that the act of January 23, 1856, authorized the legislature to repeal the act of January 30, 1850, in so far as it affected the prior rights of the Houston & Texas Central Railway Company by virtue of the act of January 30, 1854, and Sept. 26, 1866, or any other acts, special or general, of the legislature authorizing the said railway company to acquire 16 sections of land to each completed mile of railway.

Ninth.

The court further erred in not holding as well taken the assignment that the special act approved February 4, 1858, in so far as the same could be held to grant land to the Houston & Texas Central railway, ceased to be operative at the time the act of January 30, 1854, granting lands to railroads, expired by limitation, because, in pursuance of the several acts of the legislature passed in 1862-'66 and other general and special laws, the same was continued in force long after the repeal of the constitution of 1869-'70, and by virtue of the said laws and the decision of the supreme court the act of January 30, 1854, was continued in force beyond the adoption of said constitution and long after the amendment of said constitution and long after its ratification, in 1873.

Tenth.

The court erred in not sustaining appellants' 9th assignment of error and in effect holding that the war between the States closed in Texas on the 28th day of May, 1865, instead of August 20, 1866, as determined by the supreme court of Texas in Grigsby *vs.*
160 Peake, 54th Texas, p. 149, and Supreme Court of United States in Freeborn *vs.* The Protector, 12th Wallace, p. 702, and also as to the date when the act of January 30, 1854, expired and ceased to be in force and effect in so far as appellants' rights are concerned.

Eleventh.

The court erred in not holding that the 11th assignment of error was well taken, the effect of which holding was that the act approved November 13, 1866, is in conflict with the constitution of 1866 and previous constitutions of the State, and that the same was null and void. The act of November 13, 1866, has been held in the recent cases referred to of Quinlan *vs.* Railway and G., H. & S. A. R'y Co. *vs.* The State to be valid laws and to have been validly passed.

Twelfth.

The court erred in not sustaining appellants' 12th assignment of error, the action of the trial court being to the effect that the railway company could not claim land under the special act of September 21, 1866, granting 16 sections of land to the mile of completed track, holding that the railway company had forfeited its right to acquire 16 sections of land to the mile of completed road because the same was not completed 50 miles within two years from January 1, 1867, and 75 miles within three years from that date—

The time in which to complete the miles of road having been extended by that and subsequent legislation, and for the further reason that the State waived its claim to the land by extending the time, and for the further reason that the State of Texas never undertook to assert any right, and the completion of the railroad within the stated period of time was not a condition precedent.

Under and by virtue of all of said general and special
161 laws, and especially by the act of September 21, 1866, there *was* granted to said railway company 16 sections of land of 640 acres each for every mile it has constructed or may construct and put in running order, the proof having shown that the fourth section of 25 miles was completed to Bryan August 27, 1867, within the time required by the act of September 21, 1866, requiring the said road to be completed to Bryan and cars run thereon by the twenty-first day of September, 1867. See Record, p. 53.

Thirteenth.

The court erred in not holding that the 13th assignment of error was not well taken and overruling the same, to the effect that the court could inquire into the facts and go behind the action of the

executive of the State of Texas to ascertain whether or not any part of the particular road was completed within the stated period of time, and thus go behind the action of the executive department of the State to reopen the same and to determine in the face of the written testimony, to wit, the certificates, reports of the engineer, and approval of the governor, to show that their acts were not conclusive in the absence of any allegation of fraud or mistake.

Fourteenth.

The court erred in not holding as well taken and in not passing upon the 14th assignment of error, to the effect that the court below erred in holding that the act of August 15, 1870, enacted after the adoption of the constitution of 1869, was in conflict with the constitution and null and void, for this, the constitution of 1869 had prospective effect and did not relate to or affect the right of the Houston & Texas Central railway to earn lands, and the construc-
162 tion given to the constitution of 1869 that it repealed all laws granting lands to the Houston & Texas Central Railway Company and prohibited the legislature from passing the act of August 16, 1870, authorizing it to acquire the Washington County road from Hempstead, a place on the main line of the Houston & Texas Central railway, to Brenham and to build from Brenham to Austin. The railway company, by virtue of its charter and general laws and the act of 1870, had full authority to construct the road to Austin and to acquire land certificates, and the act of 1870 was a valid law, there being no legislative prohibition against the same.

The Houston & Texas Central Railway Company had no new land granted to it, but *were* receiving lands for constructing its road to which it was entitled under previous laws.

The effect of the act of 1870 merely authorized the railroad company, instead of building so much of its road from a point on its main line, to acquire the same by purchase, and from thence to build to Austin; that the charter right to build to Austin was granted by the prior legislation. The power to acquire the land was vested in the railway company and the same was no new grant, but was such a law as could be passed by legislative authority.

Fifteenth.

The court erred in not sustaining the 15th assignment of error and in not holding that F. P. Olcott purchased the lands without any notice that the same were not valid; that he purchased the same under foreclosure mortgages hereinbefore referred to, under which all of the lands of the said railway company were sold; that the Houston & Texas Central railway was a corporation organized under the laws of the State of Texas prior to January 30, 1854;
that it was constructed under and by virtue of the laws of
163 Texas, both general and special, and by virtue of the acts of 1866 that granted to it 16 sections of land of 640 acres to the mile of completed road; that by virtue of the general and special laws and by virtue of the amendments of the constitution adopted

by the legislature in 1873, and there being nothing on the face of the certificates to put Olcott upon any notice of any defect, if any, in his title, and especially the action of the State of Texas and her officers in permitting said lands to be surveyed and recognized in the land office as the lands of the railway company and patenting other land by the same series, *and* the issue of certificates was such as to lead Olcott to believe that if the State of Texas had any claim whatever it had waived the same, and in so far as the said laws were concerned the said railway company was entitled to the land grant.

Sixteenth.

The court erred in holding as not well taken the 16th assignment of error. The railway company, by virtue of the act of January 30, 1854, and September 21, 1866, and November 13, 1866, and other general and special laws—the Houston & Texas Central railway—was entitled to all the rights, privileges, and grants made in said laws for land, for there was nothing in any of said acts denying to the railroad company all the rights, privileges, and grants of land made to it to acquire 16 sections as aforesaid to the completed mile of road.

Seventeenth.

The court erred in not holding that the 17th assignment of error was well taken. The act of January 30, 1854, and the several amendments and supplements thereto, and the act of January 11, 1862, extending the said act, and the several laws passed by the legislature of 1866 and provisions of the constitution of 1869
164 and the ordinances of the convention adopting the said constitution in relation not only to land grants, but also to the suspension of limitations, and the act of March 30, 1870, extended the operation of the act of January 30, 1854, irrespective of either the law of September 21, 1866, or November 13, 1866, and that the said provisions of the constitution of 1869 and the ordinances of said convention as to setting the operation of laws of the statute of limitations giving to the Houston & Texas Central railway all the rights, benefits, and grants preserved by said act of January 30, 1854, including the grants of land for necessary sidings and turnouts until March 30, 1870.

Eighteenth.

The court erred in not sustaining this assignment.

The court erred in going behind *this assignment.* The action of the governor who appointed the engineer to inspect the road when completed and report upon the same, the said governor being constituted the sole and final judge of whether the necessary antecedent acts had been done and performed, and the decision that the railroad company had done and performed the conditions precedent to its right to acquire land, as evidenced by the certificates of the land commissioners, are conclusive and final, and there was no power in the court to review the act, and the conclusions of the con-

stituted officers, acting within the scope of their authority, was conclusive; that — the date of the issuance of the certificates to the company there was no inhibition in the constitution of the State of Texas against the legislature granting lands to railroads; the constitution of 1869–'70, acting prospectively, could impose no restriction upon any legislation affecting the rights of the H. & T. C. R'y Co.

165 Nineteenth.

The court erred in not holding as well taken the 19th assignment of error, and the effect of the holding of the court is that the construction placed upon the right of the railway company to acquire these lands by the executive department of the State would not be considered by the court.

Twentieth.

The court erred in not holding as well taken the 20th assignment of error. This assignment of error is to the effect that all the lands granted to the railway company were surveyed and returned as the law requires. Therefore the said acts and said acquiescence on the part of the State and her laches continued for so long and so constituted a waiver upon the part of the State, if any it ever had, in and to such land: field-notes returned to the general land office; books, plats, and sketches made and used as archives in the land office in the counties where the land was situated and endorsed as the lands of the Houston & Texas Central Railway Company; the executive construction placed upon the same; the legislative permission and authority to mortgage the same for the purpose of construction; payment of taxes thereon, and finally the foreclosure and purchase by Olcott.

Twenty-first.

The court erred in not holding that the 21st assignment of error was not well taken, because of the charter of the said railway company and the several acts amendatory thereof and supplements thereto, and the right to build the road to the city of Austin, granted to it by the legislature, and the decision- of Railway *vs.* Commissioner, 36th Texas, p. 383; Davis *vs.* Gray, 16th Wallace, p.
166 203, and the executive construction as to the right to acquire land within the period of thirty years. Executive, judicial, and legislative construction placed upon said charter and laws of this State establish a rule of property and a property right of defendants in and to the land sued for, and their deprivation of said land, through a new rule and through a new construction of said law, was the taking of appellants' property without due process of law, and constituted the impairment of a contract entered into between the State of Texas, on the one side, and the said railway company, through their charter and amendments thereto and legislation had in this State, on the other side, in violation of the Constitution of the United States, particularly the 10th section of the 1st article

and 14th article of amendments thereof, is a taking of plaintiff's property without due process of law, and therefore null and void.

Twenty-second.

The court erred in not holding the 22nd assignment of error well taken and in effect overruling the same, because the court below erred in striking out the answer of C. C. Gibbs to interrogatories 4, 5, and 6, and exhibits thereto, as shown by bill of exceptions No. 1, because the testimony was offered under the allegations and in behalf of appellants' defense, not excepted to, and for the purpose of showing that the defendant had lost, by reason of adverse location and by reason of the "Pacific reservation," more lands than it had received from the State of Texas under and by virtue of the same issued for sidings; so that in case the court would hold that the railroad company was not entitled to certificates for sidings upon that part of the road for which certificates involved in this suit were issued, it had not received as much land as it had located certificates for main line; and the testimony of Geo. W. Polk *was*
167 to the same effect was also excluded, over the objection of appellants, for same reason.

Twenty-third.

The court erred in not reversing said cause and in not rendering judgment for appellant for the land in controversy, because it was shown by the uncontradicted evidence that appellant was entitled to such land by virtue of its charter and amendments thereto and the general laws granting lands to railroad companies, and especially granting land to the Houston & Texas Central Railway Company, and that it had acquired the right to the same prior to the adoption of the constitution of 1869–'70 by virtue of its said charter and by virtue of the amendments thereto, the said laws, and the construction and completion in part of its line of railway, and that such right could not be taken away by said constitution, if it was so intended, without violating art. I of section 10 of the Constitution of the United States and the 14th article of amendment to said Constitution.

It is shown, as stated, that appellants had organized its road under the special acts granting lands and the laws amending its charter, and had constructed a large portion of its line of railway prior to the adoption of the constitution of 1869. It had therefore accepted the grant and expended a very large amount of money in earning the same before the adoption of the constitution of 1869–'70, and thus acquired the vested right to said grant, which could not be taken away or impaired by the constitution of 1869–'70 without violating the Constitution of the United States.

Twenty-fourth.

The court erred in not reversing said cause and rendering judgment for appellants for the land sued for, because the defendant

was, if for no other reason, entitled to said land under and
168 by virtue of the act of August 15, 1870, merging the Washington County road into the Houston & Texas Central Railway Company, and of the special acts relating to said company, and was entitled to the same by virtue of the amendments to section 6, art. 10, of the constitution of 1869, adopted by the people in November, 1872, and ratified by the legislature in March, 1873.

The adoption as aforesaid of the amendment to section 6, art. 10, of the constitution of 1869 related back as of the date of the adoption of the constitution of 1869 and removed all constitutional inhibition, if any, of the right to make such grants and gave full force and effect to the provisions of the said act of July 27, 1870, and prior legislation granting such lands to appellants.

Twenty-fifth.

The court erred in not holding that if the said Houston & Texas Central Railway Company was not otherwise entitled to the land sued for, it was entitled to said land by virtue of the provisions of the act of August 16, 1876, granting 16 sections of land to all railroad companies for every mile of railway completed and put in running order. The act incorporating the Houston & Texas Central Railway Company and other special acts relating to it showed, and other evidence tended to show, that appellants came within the provisions of the act of August, 1876, and by virtue of said act and all other acts appellant was entitled to all the benefits thereof, there being nothing to show that appellant was excepted from and was not entitled to the benefits of said law

Twenty-sixth.

The court erred in not holding that appellants were entitled to be reimbursed for all sums of money paid by it in respect to
169 surveying the lands, correcting the field-notes, paying taxes thereon, and in otherwise improving the said lands. When the State instituted the suit she subjected herself to the jurisdiction of the court to the same extent as any other litigant, so far as concerned all equitable and all legal defense to her claim, and she can claim equitable relief only when entitled upon principles of equity and good conscience.

Twenty-seventh.

The court erred in not reversing said cause and rendering judgment in favor of appellant and in not holding that the governor, in obedience to law, having appointed an engineer to inspect the road, was not the sole and exclusive judge as to whether the facts entitling appellant to certificates for lands in question existed.

The amendment to section 6, art. 10, of the constitution of 1869–'70 having been adopted and the constitutional restriction, if any, upon the granting of said land having been removed, appellant was entitled at the time the certificates in question were issued to the lands

in question for the construction of the road, and the fact of such construction having been ascertained and determined by the executive department of the State in the manner provided by law, the finding and decision thereof in accordance thereto was final and conclusive as to the time and manner when said work was done and performed and the certificates were earned.

Twenty-eighth.

The court erred in not rendering judgment reversing said cause in favor of appellants because it appeared from the special acts incorporating the Houston & Texas Central Railway Company
170 and relating to it, the law granting land to said railway company under and by virtue of said special act, and other laws, both general and special, and from the decisions of the supreme court of the State of Texas and the Supreme Court of the United States, and the uniform construction placed upon such laws by the executive department of the government — established a rule of property with respect to such land, and a vested right under such law grew up in favor of appellant, which were violated and taken away by the judgment of the court below, and the construction placed upon said law by said court was contrary to the Constitution of the United States and the amendments thereof.

Twenty-ninth.

The court erred in not reversing the judgment of the court below and rendering judgment in favor of appellant because the undisputed evidence showed that in 1870, when the law was passed merging the Washington County road into the H. & T. C., the legislature contemplated submitting for the adoption of the people the amendment to section 6, art. 10, of the constitution of 1869, removing the restriction, if any, upon appellant's right to acquire the land under its original charter and the several acts amendatory thereof and supplemental thereto or under the general laws of the State. See Railway *vs.* Groos, 47th Texas, p. 408.

Thirtieth.

The court erred in not reversing the judgment of the lower court and not rendering the same in favor of appellant, and in fact holding that the constitution of 1869, art. 10, section 1, deprived appellant of the 16 sections of land for each mile of railroad constructed by it granting to the Houston & Texas Central Railway Company and the several acts amendatory and supplemental thereof
171 and the general laws of the State upon the subject theretofore in force. This land, including all that now in controversy, was recovered by the State and judgment affirmed by this court, because the court holds the constitution of 1869 took away from the defendant the right to acquire further land, and both defendant and the legislature *was* powerless, the one to grant and the other to receive the land to which it was entitled under all the char-

ter amendments and supplements and general and special laws of the State of Texas granting lands to railroads, and particularly to appellant company, and which action of the court in so holding and in so construing the law impairs the obligation of appellant's contract whereby it was entitled to receive said land grants, and it destroyed appellant's vested rights to said land, contrary to section 10 of art. 1 of the Constitution of the United States.

Thirty-first.

The court further erred that the Houston & Texas Central Railway Company extended its road from Brenham to Austin between the date of the special act and the 25th day of December, 1891. This is, of course, the mistake of typewriter, as the road was finished 25th day of December, 1871. Record, p. 101.

The court erred, for the reasons stated, in holding that the lands were located in the "Pacific reservation," because the "Pacific reservation" was created after the file of the railroad, which was made 28th day of July, 1873. Record, p. 105. And further holding: "A sort of blanket file seems to have been made or attempted in behalf of the Houston & Texas Central Railway Company by virtue of these certificates on a large body of land, including that in controversy, but without the application of any particular certificates to any particular section of land. Nothing further seems to
172 have been done in pursuance of this file till the locations were made in June of the succeeding year."

The court has committed a grave error in the facts on this point, and appellants request another and more perfect finding of facts upon the point of file. The facts are as follows: The statement of facts on page 104 of the Record shows that "defendants also introduced in evidence the file made by the Houston & Texas Central Railway Company upon said lands dated July the 28th, 1872."

STATE OF TEXAS, }
County of Bexar. }

To the surveyor of Bexar district:

By virtue of *futy* certificates issued to the Houston & Texas Central Railway Company by the commissioner of the general land office on the first day of July, A. D. 1872, numbered from 40/4997 to 40/5036, inclusive, I hereby file upon the following vacant land in your land district, to wit, on the waters of the Colorado and Clear fork of the Brazos, in Taylor county: Beginning at the S. E. corner of John Trussell's ½ league, near the Clear fork of the Brazos and on the line of Travis district, thence west to Trussell's S. W. corner; thence northerly with his line, passing his N. W. corner and continuing to the Clear fork; thence with the Clear fork and the line of Young district to the W. line of the county; thence south to or opposite to the M. C. Lunicki sur.; thence eastward to and with Lunicki to *or* Martinez's N. E. corner; thence S. E. with Martinez, C. Colenck, Ed. Taylor, and Jas. Jeffries' E. lines to Davis Harrison;

thence northeast and northwest with the lines of Harrison, E. Isias, N. Gwatney, Thos. Linsey, W. F. Smith, T. Berwer, and W. S. Henry to the N. E. corner of said Henry's league; thence S. E. and S. W. with Henry, Jas. Walker, T-os. Linsey, and Elisch Isias to the L. Forsyth league, and with its N. and N. E. line to the line of the county; thence E. with county line of Taylor and Runnels to the
John Forbes survey; thence north with Forbes, C. M. Jack-
173 son, W. F. Sparks, Robert Triplett, and John Kincaid to the N. W. corner of the latter; thence east with Kincaid and Triplett to Smith league and with its W. and N. lines to the N. E. corner of the lines between Bexar and Travis district; thence N. W. with said line to the beginning. ROB'T M. ELGIN,
Land Agent H. & T. C. R'y.

All valid subsisting entries and surveys are hereby excluded from the above, as well as the rocky summits of mountains in vicinity of mountain pass. ROB'T M. ELGIN, *Land Ag't.*

Came to hand and filed in my office at 11 o'clock a. m. this 28th day of July, A. D. 1872, in File Book No. 4, p. 131.
C. HARNETT, *D. L. B. D.*,
By L. C. NAVARRO, *Dep.*

I, W. M. Lock, district surveyor Bexar district, do hereby certify that the foregoing is a true and correct copy of the original on record in my office in File Book No. 4, pp. 130 and 131.
Given under my hand, at San Antonio, this the 23rd day of October, A. D. 1890. W. M. LOCK,
District Surveyor Bexar District.

The file was also filed in the general land office of Texas. See Record, p. 106.

The suit is to recover land, the certificate number and
174 survey number of which are as follows:

Certificate No.	Survey No.	Block No.
38/4438	169	64
38/4443	191	"
40/4997	199	"
40/4998	201	"
40/4999	203	"
40/5001	207	"
40/5002	209	"
40/5003	211	"
40/5004	213	"
40/5005	215	"
40/5006	217	"
40/5019	243	"
40/5020	245	"
40/5021	247	"
40/5022	249	"
40/5023	251	"

The surveys were located in said file by virtue of certificates numbered from 40/4997 to 40/5036, inclusive. It will thus be seen that survey No. 169 is located by virtue of certificate 38/4438 and is not covered by the file, and survey No. 191 is located by virtue of *file* No. 38/4443 — is not covered by the file; surveys numbers 169 and 191 only are not embraced in the file, and if the "Pacific reservation" is a valid act these two surveys are affected by it, but all the others are prior to it. The court misapprehends the law in force which gave parties who made files on land 12 months thereafter in which to survey the lands by virtue of the certificates.

So, then, from the 28th day of July, 1872, the date of filing (Record, p. 105), to 7th day of June, A. D. 1873, the date when the lands were surveyed, Record, p. 2, constitutes a period of time less than twelve months. The act creating the "Pacific reservation" was passed May 2, 1873, but was not approved by the governor. It was passed while the file above referred to was in existence and had not expired.

The findings of fact and conclusions of law were filed by the district judge who tried the cause without any request of the parties; that the same were not full enough to be considered as the
175 material facts, and the parties filed an agreed statement of facts as provided by law. See Record, p. 79 to 134, inclusive. The court cannot rely on the findings of fact below, as there was no finding whatever that appellants had a file, and appellants request the court to find additional facts, and especially to set out in the findings appellant-' file on pages 104, 105.

Thirty-second.

The court erred in holding in effect that the constitution of 1869 (art. 10, sec. 6) stand- in the way of any grants of land to railroads when the act of August 15, 1870, which authorized the extension of the old Washington County railroad from Brenham to Austin, was passed, "for if the effect of the same was to repeal land grants to the Houston & Texas Central Railway Company, then the same impaired the obligation of appellants' contract right to acquire 16 sections of 640 acres of land for each and every mile of road constructed and to be constructed by said railroad company."

By virtue of the act entitled "An act supplemental to the acts to establish the Galveston & Red River Railway Company," approved February 7, 1853, the said railway company was authorized "to build a branch thereof towards the city of Austin under the restrictions and stipulation provided in said original act," etc.

The act approved September 1, 1856, granted to said compant "the rights, benefits, and privileges granted by an act approved January 30, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of lands.'" This act further provided "that said company shall be required to complete the main trunk of said road to the 32nd degree of north latitude or until they shall connect with some road reaching to or in the vicinity of Red

river before they shall commence any branch road." Sec. 5
176 of said act required the railroad in accepting the benefits of said act to yield all general branching privileges except such as are expressly granted by the provisions of its charter to certain points, and shall be required to spend only so much of its capital stock upon any branch as shall be expressly subscribed to such branch, and shall not spend upon its trunk any moneys subscribed to any branch, and shall be required to complete its main trunk to the point on Red river contemplated in its charter," etc.

The act of September 21, 1866, entitled "An act granting lands to the Houston & Texas Central Railway Company," granted to it "16 sections of land of 640 acres each for every mile of road it has constructed or may construct and put in running order in accordance with the provisions of the charter of said railway company."

The State having contracted with said railway company to grant it land for every mile of road it has constructed or may construct, it was error to hold that the same was cut off by virtue of the constitution of 1869 (art. 10, sec. 6) or to hold that the act of 1870, merging into the Houston & Texas Central Railway Company the Washington County railroad, which began at Hempstead, a point on the main trunk line of the Houston & Texas Central Railway Company, and terminated at Brenham, and allowing said latter-named road to construct from Brenham to Austin, was other than to merge said road and relieve the company from beginning its road on the main line, and that it granted any new or greater power than it already possessed to acquire lands by building to Austin, and that by reason of said act of merger of August 15, 1870, the right to acquire the land was not cut off by the constitution of 1869–'70.

The road to Austin was completed simultaneously with the main line.

177 Thirty-third.

The court erred in holding that appellants' right to acquire 16 sections of land to the mile was dependent alone upon the general law passed on that subject in 1854 and extended for ten years in 1866, and that law denied to such companies (entitled to eight sections per mile) taking the benefits thereof the right to receive any grant of land for any branch road," because, as already shown, the said railway company had a charter right to build to Austin and an independent contract right to "sixteen sections of land of 640 acres of land each for every mile of road it has constructed or may construct and put in running order." Neither the act of January 23, 1856, nor the act of September 21, 1856, nor any other law limited the right of the Houston & Texas Central Railway Company to acquire land alone to the main line of road.

Thirty-fourth.

The appellants further claim that this court has committed an error in affirming this case, because the rights of the Houston &

Texas Central Railway Company to acquire land for the construction of its railway was granted by laws prior to 1869 and 1870, and the right to acquire the same was under laws in existence long after the entire railway was completed. By virtue of the charter of the said company and its amendments by the legislature there was no restriction in respect to the right of the company to acquire land for building to Austin; hence in holding that the constitution of 1869–'70 prohibited the legislature from passing the law of August 15, 1870, impairs the obligation of appellants to acquire land under its charter contract and is repugnant to the Constitution of the United States; and the said constitution of 1869–'70, so far as the same prohibited the legislature from granting any rights
178 to it to acquire land by virtue of its prior rights, is unconstitutional, null, and void, the object of the constitution of 1869–'70 being to prohibit future grants to railroads, but not intended to apply to those already organized and constructing railways under prior legislation.

Wherefore appellant prays the court to set aside its said judgment herein affirming the judgment of the court below and to grant it a rehearing.

Appellants represent that the Honorable M. M. Crane is the attorney general of the State of Texas and represents the appellee in said cause; that the said attorney general now resides and has his office in the city of Austin, county of Travis, and is attorney for appellee, The State of Texas, and appellant further prays for service of this motion to be made upon him as the law requires.

BAKER, BOTTS, BAKER & LOVETT,
AND T. D. COBBS,
Attorneys for Appellants.

Filed May 18, 1896.

Amended Motion for Rehearing.

In the Court of Civil Appeals, Second Supreme Judicial District of Texas.

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.*, Appellants,
vs.
THE STATE OF TEXAS, Appellee.
} No. 1525.

Now come The Houston and Texas Central Railway Company and F. P. Olcott, appellants in the above-styled cause, by attorneys, and ask leave to amend the motion heretofore filed herein,
179 and move the court to set aside the judgment rendered on the 9th day of May, 1896, in this cause affirming the judgment of the court below in the above-stated cause, and for grounds for a rehearing submit the following:

First. The court erred in not considering and in effect overruling appellants' first assignment of error, to the effect that the court below erred in overruling the appellants' plea to the jurisdiction of the

district court to try said cause, because it was shown that all the property of the Houston and Texas Central Railway Company, including the lands sued for, was in the hands of Charles Dillingham, as receiver thereof, appointed under the orders and decrees of the United States circuit court in consolidated cause No. 198, entitled "Nelson S. Easton *et al.*, trustees, *vs.* The Houston and Texas Central Railway Company *et al.*," pending long prior to the institution of this suit in the United States circuit court for the eastern district of Texas, at Galveston, and that said cause was instituted without permission of said United States circuit court or any one of the judges thereof, because the said Charles Dillingham, as receiver of the properties of the said railway company, was in possession of said property as receiver thereof, and was so placed in possession by the order and decree of the said United States court.

The facts in the case and the findings of the court below showed that the said receiver was in possession of the land sued for, as receiver of said United States circuit court.

Second. The court erred in not passing upon and considering appellants' first and second assignments of error and in effect overruling the same, because the assignments raised the question of want of proper parties to the suit, it being shown that Charles Dillingham, receiver, was in possession of the property sued for prior to the institution of this suit by virtue of an appointment made in consolidated cause No. 198, entitled "Nelson S. Easton *et al.*, trustees, *vs.* The
180 Houston and Texas Central Railway Company *et al.*," pending in the United States circuit court for the eastern district of Texas, at Galveston, and by virtue of which appointment his possession was extended to and included, under the order of said United States circuit court, the land sued for in this suit, and so being in the possession of said property at the institution of said suit and at the final trial of said cause, he was therefore a necessary party to the suit, and the failure to sue the said Dillingham on account of his said possession and the holding of the court as in said assignment of error shown, the failure of this court to pass upon the same was error, and for which error the appellants now here request the same to be reviewed.

Third. The court erred in not passing upon and sustaining the third assignment of error, the effect being virtually to overrule defendant's exception to plaintiff's petition, the assignment of error bringing into question the sufficiency of plaintiff's petition and raised the question as to whether or not the allegations of same would entitle plaintiff to recover the land sued for upon any ground alleged in plaintiff's petition, and because the said petition did not show wherein the railway company was not entitled to certificates for sidings or that the same were otherwise invalid, and because the petition showed upon its face that at the time the certificates were issued there was no prohibition in the constitution or laws of the State of Texas denying to the defendant the right to receive the certificates, and the said petition nowhere by any sufficient allegation negatived the right of appellant under its charter and other laws of the State of Texas authorizing the same, and nowhere

showed that the said certificates so issued to the said railway company were invalid or were unlawfully issued to it.

Fourth. The court erred in not passing upon appellants' fourth assignment of error, which raised the question as to the right
181 of the attorney general of the State of Texas to institute the suit without direct authority from the executive department, there being no law in existence or in force at the time which would authorize the attorney general, upon his own motion, to institute a suit for the recovery of land or for the cancellation of land certificates or patents to land.

And the court further erred in not considering the question raised in said assignment calling into question the right of plaintiff to prosecute the said suit upon exceptions thereto without allegations in the petition alleging that the attorney general was authorized to institute the suit, and in not requiring the attorney general, upon the demand of appellants, to allege and show what the authority was, if any, whether written or verbal, general or special, that authorized the institution of said suit.

Fifth. The court erred in overruling and in effect holding not well taken appellants' fifth assignment of error, to the effect that the land- sued for, although embraced in what is generally known as the "Texas and Pacific reservation," were not located by virtue of a valid file, and in holding and stating in the following language: "A sort of blanket file seem- to have been made or attempted in behalf of the Houston and Texas Central Railway Company by virtue of these certificates on a large body of land, including that in controversy, but without the application of any particular certificates to any particular section of land." Nothing further seems to have been done in pursuance of this file until the locations were made in June of the succeeding year.

The evidence introduced on the trial of said cause does not support the conclusion of this honorable court upon that point, because on the 28th day of July, 1872, the Houston and Texas Central Rail-
way Company made a valid file through the proper survey-
182 or's district, which file was in force and effect prior to the creation of the said reservation, and that the lands sued for by plaintiff were by the said railway company surveyed within the said file and within twelve months after the same had been made. See the file made through Robert Elgin, the land agent, and filed in the office of the county surveyor on the 28th day of July, 1872, to be found on Transcript, pp. 104 and 105; also see the map introduced by agreement of parties, showing the tracings of the file upon the land, and which shows all the land sued for, except survey numbers 169 and 191, by virtue of certificate numbers 38/4438, 38/4443, embraced within the boundaries thereof. The file was not a blanket file, as called by this honorable court, but was such a file as was authorized to be made, and the particular certificates for which the particular sections of land were surveyed are included in and embraced within the particular file. By comparing the certificate numbers with the certificate numbers embraced within the file and the survey number given, the court

will see that it has made a very serious error in ruling that the certificates were not embraced in and that any particular certificate was not applied to any particular section of land.

The findings of fact nor the statement of facts will sustain the court in its conclusion, two of which sections only are not embraced within this file, to wit, surveys 169 and 191; and the court therefore erred in holding that the appellants had no valid file.

The case of Jumbo Company *vs.* Bacon & Graves, 79th Texas, is not authority in this, because, as will be shown, if the court will examine the record in the case of Bacon & Graves in vol. 2, court of civil appeals, p. 692, it will be observed that Bacon & Graves disclaim all interest in and to certain surveys made by the Houston and Texas Central Railway Company in block 97, where the said railway company had a prior file. For part of block 97 there
183 was a file made in which the certificates were not applied to the file, and consequently the Bacon & Graves location was conceded to be superior to the railway company's surveys, unless the act of 1873 proved to be constitutional. Appellants contend that the very language of the act of 1873 recognizes, as shown in sections 5 and 6, that nothing contained in said act should be construed to impair or affect the rights of any person or persons thereto where legally acquired within said reservation.

So far as the act passed May 2, 1873, which was not approved by the governor, entitled "An act to adjust and define the rights of the Texas Pacific railway within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean," is concerned, the same is unconstitutional and void, in that from the caption of the act it purports merely to "adjust and define the rights of the Texas Pacific railway within the State of Texas," and does not purport to nor contemplates granting land or creating reservations to entitle the Texas and Pacific to acquire and locate land; and section sixth of said act undertakes to grant by reservation a new and additional width of territory on each side of the 16 miles of reservation of the old Memphis, El Paso and Pacific Railroad Company reservation not theretofore granted. This will make 80 miles in width from the 23rd meridian of longitude west to the east boundary line of New Mexico and to a point south of the southeast corner of said Territory of New Mexico—that is to say, taking the centre line of said Memphis, El Paso and Pacific Railroad Company reservation and extending 40 miles on either side thereof and after reaching the said point south of and opposite to the southeast corner of New Mexico to said reservation of the unappropriated public domain is hereby continued 80 miles in width, etc., extending westward to the Rio Grande and bounded on the north by New Mexico, the same to include
184 the Memphis-El Paso reservation hereinbefore mentioned, which reservation as herein continued and set apart shall continue to be so reserved and set apart for the purpose herein mentioned until the year 1880 and no longer.

Section seven of said act requires the commissioner of the gen-

eral land office to designate upon the maps of his office the said reservation.

Section eleven of said act as a condition precedent requires the Texas and Pacific Railway Company, by their board of directors, within fifteen days after the date of approval of the act, to signify to the governor by telegraph or otherwise the acceptance or rejection of the terms and conditions of the act, and within thirty days from the date of approval to file a formal acceptance or rejection of the same with the secretary of the State of Texas. The act was not approved by the governor. The evidence fails to show upon the part of the State that any condition whatever required to be done if the act should be held to be a valid act was performed upon the part of the railroad company, and that the same became and was a completed contract, so that the reservation was in fact made for the benefit of the said Texas and Pacific Railroad Company.

As will be seen, the court therefore erred in holding in effect that said assignment of error was not well taken, and that said lands were located in the "Texas and Pacific reservation," and that appellants' rights to acquire the same were lost to it on account of the said reservation.

Sixth. The court erred in not holding that the sixth assignment of error was well taken, which raises the question as to the right of the State of Texas to bring the suit for the recovery of land, which lands were in the possession and control of a receiver of a Federal court, acting under the decrees and orders of the Federal court having the ultimate control and disposition of the land.

185 When the property and possession of said property was by virtue of the proceedings of the said United States circuit court drawn to the said United States circuit court the effect of the said proceedings *were* equivalent to a sequestration and was a proceeding *in rem*, and the property therefore, by virtue of said receivership, was in possession and custody of the court. The suit was not one of that class of suits which would be authorized upon the ground that the same was "in respect to any act or transaction of his (receiver) in carrying on the business connected with such property," but was property and assets in the custody of the court, subject to the disposition of the court, subject to the lien impressed upon the property by the orders and decrees of said court, and subject to the mortgage lien which was sought to be foreclosed in the Federal court, the prayer of plaintiff being for judgment for possession of and title to the land, as well as for a decree cancelling the certificates; for a removal of cloud cast upon the State's title, for damages and costs. See Transcript, pp. 6, 7–9, plaintiff's petition.

Seventh. The court erred in not considering and in not holding as well taken appellants' assignment of error contained in the seventh assignment of error that the law of January 30th, 1862, and its acceptance by the Houston and Texas Central Railway Company by the resolutions passed by its board of directors November 5, 1862, restoring the stockholders to their original position in the company, was a contract by and between the State of Texas and the Houston and Texas Central Railway Company, which entitled said railway to all

the rights and privileges of the act of January 30, 1854, and the several amendments and supplements thereto, especially the right to the grants of land made therein, and that the said contract could not be impaired by any subsequent act of the State without violating the Constitution of the United States, especially in violation
186 of section 10, art. I, of the Constitution of the United States, and of the constitution of the State of Texas.

The said act of January 11th, 1862, provided that the time of the continuance of the war between the Confederate States and the United States of America should not be computed against any internal improvement in reckoning the period allowed them by their charter by any law, general or special, for the completion of any work contracted by them to do. There were two laws passed upon the same day, and both of these laws provided as a condition precedent for the Houston and Texas Central Railway Company to receive the benefits of the said act that the company should pass a resolution restoring the original *bona fide* stockholders thereof, those having paid for their stock, to all the rights, privileges, and immunities to which they were entitled previous to and of which they were divested by the sale of the road to W. J. Hutchins *et al.* The railway company did pass the resolutions, and the original *bona fide* stockholders of said company who paid for their stock were restored to all of the rights and privileges to which they were entitled previous to the sale, and by virtue of which the said railway company became entitled to receive all the benefits of the act of January 30, 1854, granting land to railroads by virtue of its charter and the other laws, general and special, of the State of Texas, and the right of the railway company became fixed to acquire these lands by the express contract so entered into by and between the State of Texas and the said railway company, for a valuable consideration, in addition to the considerations which the State received by reason of the construction of works of internal improvement.

Eighth. The court erred in not holding that the eighth assignment of error was well taken, and calling into question the action
187 of the court below in holding that the said act of January 23, 1856, authorizing the State to repeal the act of January 30, 1854, granting lands to railroads in so far as the same affected the Houston and Texas Central Railway Company, because there was granted to the Houston and Texas Central Railway Company by virtue of the act approved February 14, 1852, by virtue of section 14 thereof, eight sections of land of 640 acres each for every mile of railroad actually completed by it and ready for use; and further provided in said section that said certificates shall be for 640 acres each and located upon the unappropriated public domain in the State of Texas; and it was further provided in section 17 of said act "that it shall be lawful for any of the railways hereafter to be constructed to cross the said railway or any branch thereof or to connect at any point therewith."

It was provided by an act approved February 7, 1853, entitled "An act supplemental to the acts to establish the Galveston & Red

River Railway Company," authorizing it to make and construct, with the original railway described in said acts establishing said company, a branch thereof toward the city of Austin under the same restrictions and stipulations provided in said original acts and subject to the rights of the State to regulate the tolls by general law, that the act approved January 23, 1856, gave the Galveston and Red River railroad six months after the 30th day of January, 1856, to complete the first 25 miles of their road, commencing at the city of Houston, and provided also that the said company shall be entitled to the rights and benefits granted by an act approved January 30, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of land." The act further provided in section I that said company shall be required to complete the main trunk of said road to the thirty-second degree of north latitude
188 or until they shall connect with some road reaching to or in the vicinity of Red river before they shall commence any branch road; provided, further, that the act to regulate railroad companies, approved the 7th day of February, 1853, shall apply to this charter.

Section third of said act provided for the assignment of the land certificates to which the railroad company would be entitled, and section 4 thereof authorized the company to mortgage its lands.

Section 5 thereof required the Galveston and Red River Railway Company to yield all general branch privileges except such as are specially granted by the provision of its charter to certain points, and shall be required to spend only so much of its capital stock upon any branches as shall be expressly subscribed to such branches, and shall not expend upon its trunk any moneys subscribed to any branch, and shall be required to complete its main trunk on to the point on Red river contemplated in its charter or to such point or intersection between said road and some other road running from the northern or eastern boundary of Texas toward El Paso as shall be agreed upon between the directors of said company.

Section 6 provides that nothing shall be construed in the application to affect the right of the State to repeal or modify the act of January 30, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of lands;" provided that the rights to lands acquired before said repeal or modification shall in all cases be protected.

By an act of February 1, 1866, the name of the Galveston and Red River Railway Company was changed to that of the Houston and Texas Central Railway Company. By an act of September 21, 1866, entitled "An act granting lands to the Houston and Texas Central Railway Company;" there was granted by section one thereof to the Houston and Texas Central Railway Company a grant
189 of sixteen sections of land of six hundred and forty acres each for every mile of road it has constructed or may construct and put in running order in accordance with the provisions of the charter of said railway company; provided that the lands heretofore drawn by the said railway company by virtue of an

act entitled "An act to encourage the construction of railroads in Texas by the donations of land," approved January 30, 1854, *to* be deducted from amounts of land granted hereby, and by virtue of an act approved November 13, 1856, entitled "An act for the benefit of railroad companies," it was provided that the grant of sixteen sections of land to the mile of railroad companies heretofore or hereafter constructing railroads in Texas shall be extended under the same restrictions and limitations herein provided by law for ten years after the passage of this act."

It is error, therefore, in not holding that the said assignment was not well taken, and that the act of January 23, 1856, authorized the legislature to repeal the act of January 30, 1850, in so far as it affected the prior rights of the Houston and Texas Central Railway Company by virtue of the act- of January 30, 1854, and September 26, 1866, or any other acts, special or general, of the legislature authorizing the said railway companies to acquire 16 sections of land to each completed mile of railway.

Ninth. The court further erred in not holding as well taken the ninth assignment that the special act approved February 4, 1858, in so far as the same could be held to grant land to the Houston and Texas Central railway, ceased to be operative at the time the act of January 30, 1854, granting lands to railroads, expired by limitation, because, in pursuance of the several acts of the legislature passed in 1862-'66 and other general and special laws, the same was continued in force long after the repeal of the constitution of 1869–1870, and by virtue of the said laws and the decision of the supreme court the act
190 of January 30, 1854, was continued in force beyond the adoption of said constitution and long after the amendment of said constitution and long after its ratification, in 1873.

Tenth. The court erred in not sustaining appellants' tenth assignment of error and in effect holding that the war between the States closed in Texas on the 28th day of May, 1865, instead of August 20, 1866, as determined by the supreme court of Texas in Grigsby *vs.* Peake, 54 Texas, page 149, and Supreme Court of United States in Freeborn *vs.* The Protector, 12 Wallace, page 702, and also as to the date when the act of January 30, 1854, expired and ceased to be — force and effect in so far as appellants' rights are concerned.

Eleventh. The court erred in not holding the eleventh assignment of error was well taken, the effect of which holding was that the act approved November 13, 1866, is in conflict with the constitution of 1869 and previous constitutions of the State, and that the same was null and void. The act of November 13, 1866, has been held in the recent cases referred to of Quinlan *vs.* Railway and G., H. & S. A. R'y Co. *vs.* The State to be valid laws and to have been validly passed.

Twelfth. The court erred in not sustaining appellants' twelfth assignment of error, the action of the trial court being to the effect that the railway company could not claim land under the special act of September 21, 1866, granting 16 sections of land to the mile of completed track, holding that the railway company had forfeited its right to acquire 16 sections of land to the mile of completed road

because the same was not completed 50 miles within two years from January 1, 1867, and 75 miles within three years from that date—

The time in which to complete the miles of road having been extended by that and subsequent legislation, and for the further reason that the State waived its claim to the land by extend-
191 ing the time, and for the further reason that the State of Texas never undertook to assert any right, and the completion of the railroad within the stated period of time was not a condition precedent.

Under and by virtue of all said general and special laws, and especially by the act of September 21, 1866, there *was* granted to said railway company sixteen sections of land of six hundred and forty acres each for every mile it has constructed or may construct and put in running order, the proof having shown that the fourth section of twenty-five miles was completed to Bryan August 27, 1867, within the time required by the act of September 21, 1866, requiring the said road to be completed to Bryan and cars run thereon by the 21st day of September, 1867. (See Record, p. 53.)

Thirteenth. The court erred in holding that the thirteenth assignment of error was not well taken and overruling the same, to the effect that the court could inquire into the facts and go behind the action of the executive of the State of Texas to ascertain whether or not any part of the particular road was completed within the stated period of time, and thus go behind the action of the executive department of the State to reopen the same and to determine in the face of the written testimony, to wit, the certificates, reports of the engineer, and approval of the governor, to show that their acts were not conclusive in the absence of any allegation of fraud or mistake.

Fourteenth. The court erred in not holding as well taken and in not passing upon the fourteenth assignment of error, to the effect that the court below erred in holding that the act of August 15, 1870, enacted after the adoption of the constitution of 1869, was in conflict with the constitution and null and void, for this, the constitution of 1869 had prospective effect and did not relate to
192 or affect the right of the Houston and Texas Central railway to earn lands, and the construction given to the constitution of 1869 that it repealed all laws granting lands to the Houston and Texas Central Railway Company and prohibited the legislature from passing the act of August 16, 1870, authorizing it to acquire the Washington County road from Hempstead, a place on the main line of the Houston and Texas Central railway, to Brenham and to build from Brenham to Austin. The railway company, by virtue of its charter and general laws and the act of 1870, had full authority to construct the road to Austin and to acquire land certificates, and the act of 1870 was a valid law, there being no legislative prohibition against the same.

The Houston and Texas Central Railway Company had no new land granted to it, but *were* receiving lands for constructing its road to which it was entitled under previous laws.

The effect of the act of 1870 merely authorized the railroad company, instead of building so much of its road from a point on its

main line, to acquire the same by purchase, and from thence to build to Austin; that the charter right to build to Austin was granted by the prior legislation. The power to acquire the land was vested in the railway company and the same was no new grant, but was such a law as could be passed by legislative authority.

Fifteenth. The court erred in not sustaining the fifteenth assignment of error and in not holding that F. P. Olcott purchased the lands without any notice that the same were not valid; that he purchased the same under foreclosure mortgages hereinbefore referred to, under which all of the lands of the said railway company were sold; that the Houston and Texas Central Railway Company was a corporation organized under the laws of the State of Texas prior to January 30, 1854; that it was constructed under and by virtue of the laws of Texas, both general and special, and by
193 virtue of the acts of 1866 that granted to it sixteen sections of land of six hundred and forty acres to the mile of completed road; that by virtue of the general and special laws and by virtue of the amendments of the constitution adopted by the legislature in 1873, and there being nothing on the face of the certificates to put Olcott upon any notice of any defect, if any, in his title, and especially the action of the State of Texas and her officers in permitting said lands to be surveyed and recognized in the land office as the lands of the railway company and patenting other land by the same series, *and* the issue of certificates was such as to lead Olcott to believe that if the State of Texas had any claim whatever it had waived the same, and in so far as the said laws were concerned the said railway company was entitled to the land grant.

Sixteenth. The court erred in holding as not well taken the sixteenth assignment of error. The railway company, by virtue of the act of January 30, 1854, and September 21, 1866, and November 13, 1866, and other general and special laws—the Houston and Texas Central Railway Company—was entitled to all the rights, privileges, and grants made in said laws for land, for there was nothing in any of said acts denying to the railway company all the rights, privileges, and grants of land made to it to acquire sixteen sections as aforesaid to the completed mile of road.

Seventeenth. The court erred in not holding that the seventeenth assignment of error was well taken. The act of January 30, 1854, and the several amendments and supplements thereto, and the act of January 11, 1862, extending the said act, and the several laws passed by the legislature of 1866 and provisions of the constitution of 1869 and the ordinances of the convention adopting the said constitution in relation not only to land grants, but also to the suspension of limitations, and the act of March 30, 1870, extended
194 the operation of the act of January 30, 1854, irrespective of either the law of September 21, 1866, or November 13, 1866, and that the said provisions of the constitution of 1869 and the ordinances of said convention as to setting the operation of laws of statute of limitations giving to the Houston and Texas Central Railway Company all the rights, benefits, and grants preserved by

the said act of January 30, 1854, including the grants of land for necessary sidings and turnouts until March 30, 1870.

Eighteenth. The court erred in not sustaining this assignment. The court erred in going behind the certificates. The action of the governor who appointed the engineer to inspect the road when completed and report upon the same, the said governor being constituted the sole and final judge of whether the necessary antecedent acts had been done and performed, and the decision that the railroad company had done and performed the conditions precedent to its right to acquire land, as evidenced by the certificates of the land commissioners, are conclusive and final, and there was no power in the court to review the act, and the conclusions of the constituted officers, acting within the scope of their authority, was conclusive. At the date of the issuance of the certificates to the company there was no inhibition in the constitution of the State of Texas against the legislature granting lands to railroads; the constitution of 1869–1870, acting prospectively, could impose no restriction upon any legislature affecting the rights of the Houston and Texas Central Railway Company.

Nineteenth. The court erred in not holding as well taken the nineteenth assignment of error, and the effect of the holding of the court is that the construction placed upon the right of the railway company to acquire these lands *would* by the executive department of the State — not be considered by the court.

Twentieth. The court erred in not holding as well taken the
195 twentieth assignment of error. This assignment of error is to the effect that all the lands granted to the railway company were surveyed and returned as the law requires. Therefore the said acts and said acquiescence on the part of the State and her laches continued for so long constituted a waiver upon the part of the State, if any it ever had, in and to such land: field-notes returned to the general land office; books, plats, and sketches made and used as archives in the land office in the counties where the land was situated and endorsed as the lands of the Houston and Texas Central Railway Company; the executive construction was placed upon the same; the legislative permission and authority to mortgage the same for the purpose of construction; payment of taxes thereon, and finally the foreclosure and purchase by Olcott.

Twenty-first. The court erred in holding that the twenty-first assignment of error was not well taken, because of the charter of the said railway company and the several acts amendatory thereof and supplemental thereto, and the right to build the road to the city of Austin, granted to it by the legislature, and the decision of Railway *vs.* Commissioner, 36 Tex., p. 383; Davis *vs.* Gray, 16 Wallace, p. 203, and the executive construction as to the right to acquire land for the period of thirty years. Executive, judicial, and legislative construction placed upon said charter and laws of this State establish a rule of property and a property right of defendants in and to the land sued for, and their deprivation of said land, through a new rule and through a new construction of said law, was the taking of appellants' property without due process of

law, and constituted the impairment of a contract entered into between the State of Texas, on the one side, and the said railway company, through their charter and amendments thereto and legislation had in this State, on the other side, in violation of the Constitution of the United States, particularly the tenth section of the
196 first article and fourteenth article of amendments thereof, is a taking of appellants' property without due process of law, and is therefore null and void.

Twenty-second. The court erred in not holding the twenty-second assignment of error well taken and in effect overruling the same, because the court below erred in striking out the answer of C. C. Gibbs to interrogatories 4, 5, and 6, and exhibits thereto, as shown by bill of exceptions No. 1, because the testimony was offered under the allegations and in behalf of appellants' defense, not excepted to, and for the purpose of showing that the defendant had lost, by reason of adverse locations and by reason of the "Pacific reservation," more lands than it had received from the State of Texas under and by virtue of the same issued for sidings; so that in case the court would hold that the railroad company was not entitled to certificates for sidings upon that part of the road for which certificates involved in this suit were issued, it had not received as much land as it had located certificates for main line; and the testimony of Geo. W. Polk to the same effect was also excluded, over the objection of appellants, for the same reason.

Twenty-third. The court erred in not reversing said cause and in not rendering judgment for appellants for the land in controversy, because it was shown by the uncontradicted evidence that appellants were entitled to such land by virtue of its charter and amendments thereto and the general laws granting lands to railroad companies, and especially granting land to the Houston and Texas Central Railway Company, and that it had acquired the right to the same prior to the adoption of the constitution of 1869–1870 by virtue of its said charter and by virtue of the amendments thereto, the said laws, and the construction and completion in part of its line of railway, and that such right could not be
197 taken away by said constitution, if it was so intended, without violating article one of section ten of the Constitution of the United States and the fourteenth article of amendment to said Constitution.

It is shown, as stated, that appellants had organized its road under the special acts granting lands and the laws amending its charter, and had constructed a large portion of its line of railway prior to the adoption of the constitution of 1869. It had therefore accepted the grant and expended a very large amount of money in earning the same before the adoption of the constitution of 1869–1870, and thus acquired the vested right to said grant, which could not be taken away or impaired by the constitution of 1869–'70 without violating the Constitution of the United States.

Twenty-fourth. The court erred in not reversing said cause and rendering judgment for appellants for the land sued for, because

the defendants were, if for no other reason, entitled to said land under and by virtue of the act of August 15, 1870, merging the Washington County road into the Houston and Texas Central Railway Company, and of the special acts relating to said company, and was entitled to the same by virtue of the amendments to section six, article ten, of the constitution of 1869, adopted by the people in November, 1872, and ratified by the legislature in March, 1873.

The adoption as aforesaid of the amendment to section six, article ten, of the constitution of 1869 related back as of the date of the adoption of the constitution of 1869 and removed all constitutional inhibition, if any, of the rights to make said grants and gave full force and effect to the provisions of the said act of August 15, 1870, and prior legislation granting such lands to appellants.

Twenty-fifth. The court erred in not holding that if the said Houston and Texas Central Railway Company was not
198 otherwise entitled to the land sued for, it was entitled to said land by virtue of the provisions of the act of August 16, 1876, granting sixteen sections of land to all railroad companies for every mile of railway completed and put in running order. The act incorporating the Houston and Texas Central Railway Company and other special acts relating to it showed, and other evidence tended to show, that appellants came within the provisions of the act of August, 1876, and by virtue of said act and all other acts appellants were entitled to all the benefits thereof, there being nothing to show that appellants were excepted from and were not entitled to the benefits of said law.

Twenty-sixth. The court erred in not holding that appellants were entitled to be reimbursed for all sums of money paid by it in respect to surveying the land, correcting the field-notes, paying taxes thereon, and in otherwise improving the said land. When the State instituted the suit she subjected herself to the jurisdiction of the court to the same extent as any other litigant, so far as concerned all equitable and all legal defense to her claim, and she can claim equitable relief only when entitled upon principles of equity and good conscience.

Twenty-seventh. The court erred in not reversing said cause and rendering judgment in favor of appellants and in not holding that the governor, in obedience to law, having appointed an engineer to inspect the road, was not the sole and exclusive judge as to whether the facts entitling appellants to certificates for lands in question existed.

The amendment to section six, article 10, of the constitution of 1869–'70 having been adopted and the constitutional restriction, if any, upon the granting of said land having been removed, appel-
lants were entitled at the time the certificates in question
199 were issued to the lands in question for the construction of the road, and the fact of such construction having been ascertained and determined by the executive department of the State in the manner provided by law, the finding and decision thereof in accordance thereto was final and conclusive as to the

time and manner when said work was done and performed and the certificates were earned.

Twenty-eighth. The court erred in not rendering judgment reversing said cause in favor of appellants because it appeared from the special acts incorporating the Houston and Texas Central Railway Company and relating to it, the law granting land to said railway company under and by virtue of the special act, and other laws, both general and special, and from the decision of the supreme court of Texas and the Supreme Court of the United States, and the uniform construction placed upon such laws by the executive department of the government — established a rule of property with respect to such land, and a vested right under such law grew up in favor of appellants, which were violated and taken away by the judgment of the court below, and the construction placed upon said law by said court was contrary to the Constitution of the United States and the amendments thereof.

Twenty-ninth. The court erred in not reversing the judgment of the court below and rendering judgment in favor of appellants because the undisputed evidence showed that in 1870, when the law was passed merging the Washington County road into the Houston and Texas Central Railway Company, the legislature contemplated submitting for the adoption of the people the amendment to section six, article ten, of the constitution of 1869, removing the restriction, if any, upon appellants' right to acquire the land under its original charter and the several acts amendatory thereof and supplemental thereto under the general laws of the State. See Railway *vs.* Groos, 47 Texas, p. 408.

200 Thirtieth. The court erred in not reversing the judgment of the lower court and not rendering the same in favor of appellants, and in fact holding that the constitution of 1869, article ten, section 1, deprived appellants of the sixteen sections of land for each mile of railroad constructed by it granting to the Houston and Texas Central Railway Company and the several acts amendatory and supplemental thereof and the general laws of the State upon the subject theretofore in force. This land, including all that now in controversy, was recovered by the State and judgment affirmed by this court, because the court holds that the constitution of 1869 took away from the defendants the right to acquire further land, and both defendants and the legislature were powerless, the one to grant and the other to receive the land to which it was entitled under all the charter amendments and supplements and general and special laws of the State of Texas granting lands to railroads, and particularly to appellant company, and which action of the court in so holding and in so construing the law impairs the obligation of appellants' contract whereby it was entitled to receive said land grants, and it destroyed appellants' vested right to said land, contrary to section ten of article 1 of the Constitution of the United States.

Thirty-first. The court erred in holding that the Houston and Texas Central Railway Company extended its road from Brenham to Austin between the date of the special act and the 25th day of De-

cember, 1891. This is, of course, the mistake of the typewriter, as the road was finished 25th day of December, 1871. Record, p. —.

The court erred, for the reasons stated, in holding that the lands were located in the "Pacific reservation," because the "Pacific reservation" was created after the file of the railroad, which was made 28th day of July, 1873. Record, p. 105. And further hold-
201 ing: "A sort of blanket file seems to have been made or attempted in behalf of the Houston and Texas Central Railway Company by virtue of these certificates on a large body of land, including that in controversy, but without the application of any particular certificates to any particular section of land. Nothing further seems to have been done in pursuance of this file till the locations were made in June of the succeeding year."

The court has committed a grave error in the facts on this point, and appellants request another and more perfect finding of facts upon the point of file. The facts are as follows: The statement of facts on page 104 of the Record shows that defendants also introduced in evidence the file made by the Houston and Texas Central Railway Company upon said lands dated July 26, 1872.

"STATE OF TEXAS, }
County of Bexar. }

To the surveyor of Bexar district:

By virtue of *futy* certificates issued to the Houston and Texas Central Railway Company by the commissioner of the general land office on the first day of July, A. D. 1872, numbered from 40/4997 to 40/5036, inclusive, I hereby file upon the following vacant land in your land district, to wit, on the waters of the Colorados and Clear fork of the Brazos, in Taylor county: Beginning at the southeast corner of John Trussell's ½ league, near the Clear fork of the Brazos and on the line of Travis district, thence west to Trussell's S. W. corner; thence northerly with his line, passing his N. W. corner and continuing to the Clear fork; thence with the Clear fork and the line of Young district to the W. line of the county; thence south to or opposite to the M. C. Lunicki sur.; thence eastward to and with Lunicki to *or* Martinez's N. E. corner; thence S. E. with Martinez, C. Colenck, Ed. Taylor, and Jas. Jeffries' E. lines to Davis Harrison; thence northeast and northwest with the lines of Harrison,
202 E. Isias, N. Gwatney, Thos. Linsey, W. F. Smith, T. Berwer, and W. S. Henry to the N. E. corner of said Henry's league; thence S. E. and S. W. with Henry, Jas. Walker, Thos. Linsey, and Elisch Isias to the L. Forsyth league and with its N. and N. E. corner to the line of the county; thence east with *counter* line of Taylor and Runnels to the John Forbes survey; thence north with Forbes, C. M. Jackson, W. F. Sparks, Robert Triplett, and John Kincaid to the N. W. corner of the latter; thence east with Kincaid and Triplett to Smith league and with its W. and N. lines to the N. E. corner of the lines between Bexar and Travis district-; thence N. W. with said line to the beginning.

ROBERT M. ELGIN,
Land Agent H. & T. C. R'y Co.

All valid subsisting entries and surveys are hereby excluded from the above, as well as the rocky summits of mountains in vicinity of mountain pass.

ROB'T M. ELGIN, *Land Ag't.*

Came to hand and filed in my office at 11 o'clock a. m. this 28th day of July, A. D. 1872, in File Book No. 4, p. 131.

C. HARNETT, *D. L. B. D.*,
By L. C. NAVARRO, *Dep.*

I, W. M. Locke, district surveyor Bexar district, dohere by certify that the foregoing is a true and correct copy of the original on record in my office in File Book No. 4, pp. 130 and 131.

Given under my hand, at San Antonio, this the 23rd day of October, A. D. 1890.

W. M. LOCKE,
District Surveyor Bexar District."

The file was also filed in the general land office of Texas. (See Record, page 106.)

203 The suit is to recover land, the certificate number- and survey number- of which are as follows:

Certificate No.	Survey No.	Block No.
38/4438	169	64
38/4443	191	"
40/4997	199	"
40/4998	201	"
40/4999	203	"
40/5001	207	"
40/5002	209	"
40/5003	211	"
40/5004	213	"
40/5005	215	"
40/5006	217	"
40/5019	243	"
40/5020	245	"
40/5021	247	"
40/5022	249	"
40/5023	251	"

(Rec., p. 2.)

The surveys were located in said file by virtue of certificates numbered from 40/4997 to 40/5036, inclusive. It will thus be seen that survey No. 169 is located by virtue of certificate 38/4438 and is not covered by the file, and survey No. 191 is located by virtue of *file* No. 38/4443 — is not covered by the file; surveys numbers 169 and 191 only are not embraced in the file, and if the "Pacific reservation" is a valid act these two surveys are affected by it, but all the others are prior to it. The court misapprehends the law in force

which gave parties who made files on land 12 months thereafter in which to survey the lands by virtue of the certificates.

So, then, from the 28th day of July, 1872, the date of the filing (Rec., p. 105), to 7th day of June, A. D. 1873, the date when the lands were surveyed (Record, p. 2), constitutes a period of time less than twelve months. The act creating the "Pacific reservation" was passed May 2, 1873, but was not approved by the governor. It was passed while the file above referred to was in existence and had not expired.

204 The findings of fact and conclusions of law were filed by the district judge who tried the cause without any request of the parties; that the same was not full enough to be considered as the material facts, and the parties filed an agreed statement of facts as provided by law. (See Record, pp. 79 to 134, inclusive.) The court cannot rely wholly on the findings of fact below, as there was no finding whatever that appellants had a file, and appellants request the court to find additional facts, and especially to set out in the finding appellants' file on pages 104, 105.

Thirty-second. The court erred in holding in effect that the constitution of 1869 (article 10, section 6) stands in the way of any grants of land to railroads when the act of August 15, 1870, which authorized the extension of the old Washington County road from Brenham to Austin, was passed, "for if the effect of same was to repeal land grants to the Houston and Texas Central Railway Company, then the same impaired the obligation of appellants' contract right to acquire sixteen sections of six hundred and forty acres of land for each and every mile of road constructed and to be constructed by said railroad company."

By virtue of the act entitled "An act supplemental to the acts to establish the Galveston and Red River Railway Company," approved February 7, 1853, the said railway company was authorized "to build a branch thereof towards the city of Austin under the same restrictions and stipulation provided in said original act," *and* etc.

The act approved September 1, 1856, granted to said company "the rights, benefits, and privileges granted by an act approved January 30, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of lands.'" This act further provided "that said company shall be required to complete the main trunk of said road to the 32 degree of north latitude or until

205 they shall connect with some road reaching to or in the vicinity of Red river before they shall commence any branch road."

Section five of said act required the railroad in accepting the benefits of said act to "take all general branching privileges except such as are expressly granted by the provisions of its charter to certain points, and shall be required to spend only so much of its capital stock upon any branch as shall be expressly subscribed to such branch, and shall not spend upon its trunk any moneys subscribed to any branch, and shall be required to complete its main trunk to the point on Red river contemplated in its charter," etc.

The act of September 21, 1866, entitled "An act granting lands

to the Houston and Texas Central Railway Company," granted to it "sixteen sections of land of 640 acres each for every mile of road it has constructed or may construct and put in running order in accordance with the provisions of the charter of said railway company."

The State having contracted with said railway company to grant it land for every mile of road it has constructed or may construct, it was error to hold that the same was cut off by virtue of the constitution of 1869 (article 10, section 6) or to hold that the act of 1870, merging into the Houston and Texas Central Railway Company the Washington County railroad, which began at Hempstead, a point on the main trunk line of the Houston and Texas Central Railway Company, and terminated at Brenham, and allowing said latter-named road to construct from Brenham to Austin, was other than to merge said road and relieve the company from beginning its road on the main line, and that it granted no new or greater power than it already possessed to acquire lands by building to Austin, and that by reason of said act of merger of August 16, 1870, the right to acquire the land was not cut off by the constitution of 1869–'70.

206 The road to Austin was completed simultaneously with the main line.

Thirty-third. The court erred in holding that appellants' right to acquire sixteen sections of land to the mile was dependent alone upon the general law passed on that subject in 1854 and extended for ten years in 1866, and that law denied to such companies (entitled to eight sections per mile) taking the benefits thereof the right to receive any grant of land for any branch road, because, as already shown, the said railway company had a charter right to build to Austin and an independent right to "sixteen sections of land of six hundred and forty acres of land each for every mile of road it has constructed or may construct and put in running order." Neither the act of January 23, 1856, nor the act of September 21, 1866, nor any other law limited the right of the Houston and Texas Central Railway Company to acquire land alone to the main line of road.

Thirty-fourth. The appellants further claim that this court has committed an error in affirming this case, because the rights of the Houston and Texas Central Railway Company to acquire land for the construction of its railway was granted by laws prior to 1869 and 1870, and the right to acquire the same was under laws in existence long after the entire railway was completed. By virtue of the charter of the said company and its amendments by the legislature there was no restriction in respect to the right of the company to acquire land for building to Austin; hence in holding that the constitution of 1870 prohibited the legislature from passing the law of August 15, 1870, impairs the obligation of appellants to acquire land under its charter contract and is repugnant to the Constitution of the United States; and the said constitution of 1869 and 1870,

207 so far as the same prohibited the legislature from granting any rights to it to acquire land by virtue of its prior rights, is unconstitutional, null, and void, the object of the consti-

tution of 1869–'70 being to prohibit future grants to railroads, but not intended to apply to those already organized and constructing railways under prior legislation.

Thirty-fifth. This court erred in not considering and in not sustaining appellants' twenty-third assignment of error, to the effect that the suit was instituted against the property of the Houston and Texas Central Railway Company while it and all its properties were in the hands of a receiver appointed by the United States circuit court, who was then in possession of the property, and that the suit was brought in violation of the comity existing between courts of concurrent jurisdiction without asking the permission of the court in possession of said property and the court appointing the receiver and the court where the receivership is pending for the authority to sue for the property which was by law in the possession of the receiver; and, further, because the evidence having shown that said property being in the possession of the receiver under and by virtue of the orders and decrees of said United States court the law required the suit to be brought against the party in possession, who was Charles Dillingham, receiver as aforesaid.

Thirty-sixth. For all the reasons given and for the various grounds specified, both in this motion and in the assignments of error, the court below erred in not finding against the State and in not giving judgment for appellants for the land sued for, and this court, for the same reasons as herein shown, erred in not reversing the judgment and rendering the same for appellants.

Thirty-seventh. The court erred in not holding that appellants were entitled to the land grant by virtue of its charter rights and laws, general and special, passed prior to the adoption of
208 the constitution of 1869–'70, and in not holding that, in so far as the constitution of 1869–'70 interfered with the right of appellants to the land grant, the same was unconstitutional, null, and void.

That the first section of the act of August 15, 1870, entitled "An act for the relief of the Houston and Texas Central Railway Company," provided "that the Washington County railroad is hereby declared to be, to all intents and purposes in law, a part of the Houston and Texas Central railway, and shall be under the control and management of the Houston and Texas Central Railway Company in like manner as every other part of the said railway, and the Houston and Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the Washington County railroad from the town of Brenham, in the county of Washington, to the city of Austin," &c.

It was further provided in said act "the said Houston and Texas Central Railway Company," by reason of the construction of the said railway from the town of Brenham to the city of Austin and by reason of the construction of the said branch from Navarro county to Red river, shall have and enjoy all the rights, privileges, grants, and benefits that are now or may at any time hereafter be secured to any railroad company in the State of Texas by any general law of the State," &c.

Section four thereof provided "no forfeiture of any of the rights or privileges secured to it by any existing laws shall be enforced against the said Houston and Texas Central Railway Company by reason of its failure to comply with the conditions as to the construction imposed by the first section of the act of the twenty-first of September, A. D. 1866, entitled 'An act granting lands to the Houston and Texas Central Railway Company,' but the said company shall have and enjoy all the rights and privileges secured to it by existing laws, the same as if the conditions em-
209 braced in the first section of the said act of the twenty-first of September, A. D. 1866, had in all respects — compiled with."

The act of 1870 gave the right to acquire the Washington County road and to build from Brenham to Austin instead of from some point on the main line. It did not alter or repeal the charter right entitled "An act supplemental to the acts to establish the Galveston and Red River Railway Company," approved February 7, 1853, authorizing the railway company to build to Austin from the main line.

It relieved the railway of the restriction contained in section one of the act approved September 1st, 1856, which required the road "to complete the main trunk of said road to the thirty-second degree of north latitude or until they shall connect with some road reaching to or in the vicinity of Red river before they shall commence any branch road."

It continued in full force and effect "all the rights and privileges secured to it by the existing laws."

Hence the right to acquire the land being a charter right the right to the lands sued for could not be divested by the construction placed upon the constitution of 1869–'70 without impairing the obligation of appellants' contract right, and the court erred in holding that the power to acquire land for "building the road to Austin was withheld by the clause (article ten, section 6, of 1869) of the constitution referred to;" and further erred in holding *that* the right of the said railway "to have sixteen sections of land to the mile for so building it under the general law on that subject as passed in 1854 and extended for ten years in 1866," for the right of appellants, as shown, is predicated, not only upon the general laws on the subject, but also upon its charter rights, amendments, and supplements thereto, all in full force and effect at the date of the adoption of said constitution of 1869–'70.

Wherefore appellants pray the court to set aside its said
210 judgment herein affirming the judgment of the court below and to grant it a rehearing.

Appellants represent that the Hon. M. M. Crane is the attorney general of the State of Texas and represents the appellee in said cause; that the said attorney general now resides and has his office in the city of Austin, county of Travis, and is attorney for appellee

The State of Texas; and appellant further prays for service of this motion to be made upon him as the law requires.

BAKER, BOTTS, BAKER & LOVETT,
AND T. D. COBBS,
Attorneys for Appellants.

Filed in court of civil appeals May 23, 1896.

Motion for Additional Findings of Fact.

In the Court of Civil Appeals for the 2nd Judicial District, at Fort Worth, Texas.

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.*, Appellants,
vs.
THE STATE OF TEXAS, Appellee.

And now comes the appellants, by their attorney, and asks the court to make additional findings of fact as follows:

1st. That the appellants had a file made upon said land as follows:

STATE OF TEXAS,
County of Bexar,

To the surveyor of Bexar district:

By virtue of *fu*-ty certificates issued to the Houston and Texas Central Railway Company by the commissioner of the general land office on the first day of July, A. D. 1872, numbered from 40/4997 to 40/5036, inclusive, I hereby file upon the following vacant land in your land district, to wit: On the waters of the Colorados and Clear fork of the Brazos, in Taylor county: Beginning at the S. E. cor. of John Trussell's ½ league, near the Clear fork of the Brazos and on the line of Travis district, thence west to Trussell's S. W. corner; thence northerly with his line, passing his N. W. corner, and continuing to the Clear fork; thence with the Clear fork and the line of Young district to the W. line of the county; thence south to or opposite to the M. C. Lunicki sur.; thence eastward to and with Lunicki to *or* Martinez's N. E. corner; thence S. E. with Martinez's, C. Colenck, Ed. Taylor, and James Jeffries' E. lines to David Harrison; thence northeast and northwest with the lines of Harrison, E. Isias, N. Gwatney, Thos. Linsey, W. F. Smith, T. Berwer, and W. S. Henry to the N. E. corner of said Henry's league; thence S. E. and S. W. with Henry, James Walker, Thos. Linsey, and Elisch Isias to the L. Forsyth league, and with its N. and N. E. line to the line of the county; thence E. with county line of Taylor and Runnels to the John Forbes survey; thence north with Forbes, C. M. Jackson, W. F. Sparks, Rob't Triplett, and John Kincaide to N. E. corner of the latter; thence east with Kincaide and Triplett to Smith league,

211

and with its W. and N. lines to the N. E. corner on the line between Bexar and Travis district; thence N. W. with said line to the beginning.

ROB'T M. ELGIN,
Land Agent H. and T. C. Railway.

All valid subsisting entries and surveys are hereby excluded from the above, as well as the rocky summits of mountains in vicinity of mountains pass.

ROB'T M. ELGIN, *Land Ag't.*

Came to hand and filed in my office at 11 o'clock a. m. this 28th day of July, A. D. 1872, in File Book No. 4, page 131.

C. HARNETT, *D. L. B. D.*,
By L. C. NAVARRO, *Dep.*

212 I, W. M. Lock, surveyor Bexar district, do hereby certify that the foregoing is a true and correct copy of the original on record in my office in File Book No. 4, pages 130 and 131.

Given under my hand, at San Antonio, this the 23rd day of October, A. D. 1890.

W. M. LOCKE,
District Surveyor, Bexar District.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *March 24th*, 1892.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original, with endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix the impress of the seal of said office the date last above written.

[SEAL.] W. L. McGAUGHEY,
Com'r G'l L'd Office.

Rec., p. 104–'5.

Also the map showing file delineated thereon. Rec., p. 134.

2nd. That the parties agreed "that all special acts of the legislature of the State of Texas, all railroad charters and amendments thereto bearing upon the subject-matter of this litigation may be considered in evidence without introducing the same." See Rec., p. 80.

3rd. That the land-scrip certificates included in the suit, and the land located by virtue thereof, were issued for that portion of the road constructed between Brenham and Austin. Rec., p. 79.

4th. Also show the roads that got lands and sidings under the construction of the executive department. Rec., p. 109.

213 5th. That the lands were continued in the hands of Chas. Dillingham, receiver, first, by order of the United States circuit court, Rec., p. 125, and then further continued in his possession by an order of Associate Justice Lamar as follows:

United States Circuit Court, Eastern District of Texas.

STEPHEN W. CAREY *et al.*, Appellants,
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.*, Appellees.

It appearing to my satisfaction from the annexed petition and affidavit that the appellants have taken and perfected appeals to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, which appeals are taken in good faith, and that no injury can accrue to the appellees by a stay of proceedings, as herein directed, pending the hearing and decision of the said appeals:

Now, therefore, on motion of R. H. Landale, solicitor for complainants—

It is ordered that pending the hearing and decision of the said appeals taken by the complainants to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, Charles Dillingham, the receiver of the Houston and Texas Central railway, be, and he is hereby, stayed from surrendering or delivering possession of the Houston and Texas Central railway or any of the line of railway formerly operated by the Houston and Texas Central Railway Company and of which he is now possessed, as receiver, and from permitting the said railways to be operated by any corporation or person other than himself, with liberty to the receiver, the appellees, or any of them to apply to me to vacate the said stay if
214 the said appellant- fail to prosecute the said appeals with due diligence.

Dated Washington, December 9th, 1892.

L. Q. C. LAMAR,
Associate Justice of the Supreme Court of the United States, Assigned to the 5th Circuit.

6th. That the governor of Texas construed the law as entitling the said railway as being entitled to the specific land grant, and held in a letter to the commissioner of the general land office on the subject, among other things, as follows: "I am of the opinion that the decision of the supreme court in the H. & G. N. R. R. case covers substantially the abstract right of the former railway, and I am not prepared to say that this company should be required to commence suit to enforce that right." See Rec., p. 131.

As appellants regard the foregoing facts to be material for the court to consider to a proper decision of the case, — do most respectfully request the court to find the same in addition to the other facts in the case.

Respectfully submitted.

BAKER, BOTTS, BAKER & LOVETT AND
T. D. COBBS, *Att'ys for Appellants.*

Filed in court of civil appeals May 23, 1896.

Opinion on Motions.

HOUSTON & TEXAS CENTRAL RAILWAY CO. *et al.*,
Appellants,
vs.
THE STATE OF TEXAS, Appellee.
No. 1881/1525.

On motion for rehearing.

This motion seems to concede that the act of 1870 gave
215 appellant company's right to build a branch of its road from Brenham instead of from some point on the main line to Austin, and that it relieved said company of the restriction contained in prior legislation, which required it "to complete the main trunk of said road to the thirty-second degree of north latitude or until they shall connect with some road reaching to or in the vicinity of the Red river before they shall commence any branch road."

From this it would seem to follow that appellant must derive its right to acquire the certificates in question, in part at least, from the act of 1870, which was passed at a time when the legislature had no power to confer such rights. We are therefore strengthened in the conclusion heretofore announced—that these certificates were invalid—and hence overrule the motion for rehearing.

The motion (No. 1882) for additional findings, though founded in the usual misconception of the duty of this court in that respect, is granted, and the matters therein copied from the record, which we are requested to incorporate in our findings, we approve and adopt as correct statements, but they need not be again copied by us.

STEPHENS,
Associate Justice.

Filed July 3, 1896.

Order on Motion for Rehearing.

H. & T. C. R'Y CO. *et al.*
vs.
THE STATE OF TEXAS.
1875/1525.

JULY 3, 1896.

This day came on to be heard the motion of appellant for a rehearing in this cause, which, having been heard and considered by the court, is overruled.

216 *Order on Amended Motion for Rehearing.*

THE H. & T. C. R'Y CO. *et al.*
vs.
THE STATE OF TEXAS.
1881/1525.

JULY 3, 1896.

This day came on to be heard the amended motion of appellants for a rehearing in this cause, which, having been heard and considered by the court, is overruled.

Order on Motion for Additional Conclusions.

THE H. & T. C. R'Y CO. *et al.*
vs.
THE STATE OF TEXAS. } 1882/1525.

JULY 3, 1896.

This day came on to be heard the motion of appellants asking the court to file additional conclusions herein, which, having been heard and considered by the court, is granted and the additional conclusions filed. It is further ordered that the clerk of this court make the following change in the opinion filed herein: On page one, 3rd line from the bottom, erase 1891 and insert 1871 in lieu thereof.

Petition for Writ of Error.

In the Supreme Court of Texas.

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY and FREDERIC P. OLCOTT
versus
THE STATE OF TEXAS.

Petition for writ of error to the court of civil appeals for the second supreme judicial district.

To the honorable the supreme court of Texas:

Your petitioners, The Houston and Texas Central Rail-
217 way Company and Frederic P. Olcott, applying for a writ of error to the court of civil appeals for the second supreme judicial district of Texas for the removal of the above-entitled cause from said court into this honorable court, respectfully represents that this the said cause was instituted on the 3rd day of February, 1890, in the district court in and for Nolan county, Texas, by the attorney general, in the name and behalf of the State of Texas, as plaintiff, against your petitioners (and George E. Downs, who subsequently disclaimed), as defendants, for the recovery of sixteen sections of land of 640 acres each, situated in Nolan county, Texas, and resulted in judgment in the court below, on the 19th day of April, 1893, in favor of the State and against petitioners for all the land sued for and in favor of George E. Downs on his disclaimer, which judgment, on appeal therefrom by petitioners, was in all things affirmed by the said court of civil appeals by a judgment rendered on the 9th day of May, 1896. Motion for rehearing was duly filed in said court by petitioners on the 18th day of May, 1896, and an amended motion for rehearing was also duly filed by petitioners on May 23rd, 1896, both of which motions were by said court overruled on the 3rd day of July, 1896, and petitioners say that in the judgment and proceedings in said cause the said court of civil appeals committed error in its rulings upon questions of law, the

determination of which were necessary to the decision of said cause in the said court of civil appeals, and which are relied upon by petitioners as grounds for their application for writ of error herein as follows, to wit:

First.

Jurisdiction of Subject-matter.

The said court of civil appeals erred in overruling and holding not well taken petitioners' first and sixth assignments of error,
218 which complained of the action and ruling of the court below in overruling and denying petitioners' plea to the jurisdiction of said court, based upon the ground, in effect, that all the land sued for was at the time in the custody and possession of the circuit court of the United States in and for the eastern district of Texas, at Galveston, in consolidated cause No. 198, on the equity docket of said court, entitled "Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, *v.* The Houston and Texas Central Railway Company *et al.*," through Charles Dillingham, the receiver of said circuit court in said cause, and in holding that notwithstanding such fact the court below had jurisdiction of this cause.

Statement.

See petitioners' plea (Trans., 11–16), decrees of the said circuit court introduced in evidence in support thereof (Trans., 124–127), and the judgment of the court below overruling and denying said plea (Trans., 5–9). See also Petitioners' Brief, pp. 4, 10; first and sixth grounds of the motion and amended motion for rehearing.

Authorities.

Ellis *v.* Water Co., 86 Tex., 109.
Russell *v.* T. & P. R. Co., 68 Tex., 646.
Brown, receiver, *v.* Brown, 71 Tex., 355.
Edwards *v.* Norton, 55 Tex., 410.
Wiswall *v.* Sampson, 14 How., 52, 65.
2 Daniel's Chanc., 1057, 1058.
Angel *v.* Smith, 9 Vesey, 335.
Brook *v.* Greathead, 1 J. & W., 176.

Second.

Necessity for Receiver as Party.

The said court of civil appeals erred in overruling and holding not well taken petitioners' second assignment of error, complaining, in effect, of the action and ruling of the court below in overruling
219 and denying and holding not well taken petitioners' plea in abatement, based upon the ground, in effect, that Charles Dillingham, the receiver of the circuit court of the United States in and for the eastern district of Texas, was a necessary and

proper party, because all the property sued for was in his custody and possession as such receiver.

Statement.

See petitioners' plea (Trans., 16, 17), the evidence offered in support thereof (Trans., 124–126), and the judgment of the court overruling and denying the same (Trans., 59). See also Petitioners' Brief (p. 6) and the second ground of the motion and amended motion for rehearing filed in the court of civil appeals.

Authorities.

Rev. Stat. 1895, art. 1208, 5254.
Ship Channel Co. *v.* Brewly, 45 Tex., 6.
De La Vega *v.* League, 64 Tex., 205, 212.
Halloway *v.* McIlhenny, 77 Texas, 657.

Third.

Overruling General Demurrer.

The said court of civil appeals erred in overruling and holding not well taken petitioners' third assignment of error, complaining of the action of the court below in overruling petitioners' general demurrer to plaintiff's petition.

Statement.

See plaintiff's original petition (Trans., 1–7), petitioners' general demurrer (Trans., 17), and the judgment of the court overruling the same (Trans., 59). The petition described the land sued for (Trans., 2), and showed that certificates had been duly issued therefor and located. It alleged (Trans., 3) that they were issued upon and for the construction of that portion of the road extending from Brenham to Austin, which it was alleged was "constructed, com-
220 pleted, and in running order on or about February 21st, 1872." It also alleged that at the time of the construction and completion of said road and at the time when said certificates were issued there was no law, general or special, authorizing or permitting their issuance, and that the commissioner of the general land office in issuing the same and in permitting them to be located acted without authority of law and in plain violation of the constitution and laws of the State; and also alleged (Trans., 5) that they were located upon lands reserved by the act of May, 1873, relating to the Texas and Pacific Railway Company. See also Petitioners' Brief, p. 67, and the third ground of their motion and amended motion for rehearing.

Argument.

By the allegation as to the issuance and location of the certificates the petition showed title to the land sued for in petitioner railway company. The only matter alleged in avoidance of or to defeat such

title were the general averments to the effect that there was at the time no law, general or special, authorizing the issuance of the certificates or their location on the land in question, and that the commissioner of the general land office acted without authority of law. These were merely conclusions of the pleader. According to the most familiar principles of pleading, he should have alleged, not merely his conclusions, but the facts upon which he relied to defeat or avoid the title which his petition showed had passed to defendant. Opposed to the mere conclusions of the pleader is the presumption of law, always indulged in favor of the regularity and validity of official acts, that the commissioner of the general land office acted in obedience to the law in issuing the certificates, and that they were legally located. Furthermore, there were a number
221 of laws, as the court judicially knows, under which the certificates might have been legally issued. There was the special act of February 14th, 1852, amending the act of incorporation of the Galveston and Red River Railway Company and granting it eight sections of land of 640 acres each for every mile of road that it should construct; the general act of January 30th, 1854, granting lands to encourage the construction of railroads; various general and special rates relating to the Houston and Texas Central railway; the act of September 21st, 1866, granting lands to the company for all road constructed by it; the general act of November 13th, 1866, granting lands to encourage the construction of railroads and continuing in force for ten years from that date; the general act of January 30th, 1854, and other acts which need not be specifically referred to here. No one will deny that the company was entitled to the certificates in question under the special act of September 21st, 1866, if it constructed its road within the time therein specified. Whether it did so or not was a question of fact for the governor to determine in the manner provided by law, and the petition nowhere alleges that the governor had not determined such fact or had determined it incorrectly, if that could be claimed. Indeed, no fact was alleged to show that the certificates were invalid or that the power of the commissioner of the general land office to issue certificates was illegally exercised with respect to them. Ordinarily the plaintiff in an action of trespass to try title may not be required, perhaps, to allege the title or claim of the defendant, but may content himself with the allegations required by Rev. Stat., art. 5250. It is to be observed, however, that in this case the plaintiff's petition shows title in defendants, and, that being true, it certainly devolved upon the plaintiff to show by appropriate averments the facts upon which it relied to avoid or overcome
222 such title, and this it did not do. We submit, furthermore, that in an action of this character, where the State is seeking to recover lands granted by it and for which certificates have been issued by the executive officers charged by law with that duty and power, and which have been located in the manner provided by law and recognized by the executive officers as valid, it devolves upon the State to do more than is required by art. 5250 in reference to ordinary actions of trespass to try title. The relief is essentially

equitable in its nature, and the State should allege the facts on which it seeks to cancel its acts and relies for the relief prayed. It may not be required in the form or with the strictness observed in bills in equity in chancery courts, but it should at least be "a statement in logical and legal form of the facts constituting the plaintiff's cause of action," as required in all cases by R. S., art. 1183, but under the loosest rules of pleading the petition in this case certainly seems to be insufficient. Nothing short of a clear and specific statement of the facts relied upon to overcome and defeat the defendants' title would suffice. We here invite the court's attention to what was said by the Supreme Court of the United States in Maxwell Land Grant case, 121 U. S., 381, 382. While that case was a proceeding in equity on the chancery docket of the court, the principle is precisely the same, and no one will contend that the facts necessary to a recovery in this case or in any case under our blended system of practice should be less than are required in that case, and, being necessary, it devolved upon the State to allege as well as to prove them.

Neither was the defect in plaintiff's original petition cured or removed by the averments of the supplemental petition (Trans., 8, 9), even if these facts would have been sufficient if incorpo-
223 rated in the original petition, because the defective statement of a cause of action in an original petition can be cured only by an amendment and not by a supplemental petition. (District court rules 12–15; Crescent Ins. Co. *v.* Camp, 64 Tex., 521.)

Fourth.

Authority of Attorney General.

The said court of civil appeals erred in overruling and holding not well taken petitioners' fourth assignment of error, complaining, in effect, of the action of the court below in overruling defendants' exception to plaintiff's petition, based upon the ground substantially that it failed to show that the attorney general was authorized or directed to institute this suit or authorized to maintain the same.

Statement.

The suit was instituted by the attorney general, and the only allegation of the petition touching his authority or power is in the opening paragraph as follows: "The State of Texas, hereinafter styled plaintiff, comes now, by its attorney general, J. S. Hogg, who acts by lawful authority of law herein, complaining," etc. Defendants specially excepted to plaintiff's petition because it did not show the attorney general had authority either under any law of the State or by direction of the governor to institute the suit and prayed that such authority be required to be shown (special exception No. 4, Trans., 18), and this exception was by the court overruled (Trans., 59). The record fails to show that any evidence whatever of such authority was offered. (See also Petitioners' Brief, page 8,

and the fourth ground of the motion and amended motion for rehearing.)

Authorities.

Constitution 1876, art. IV, sec. 32.
Rev. Stat. 1895, art. 2907.
State *v.* Moore, 57 Tex., 307.

224 *Argument.*

The office of attorney general is created by article IV, section 22, of the constitution of 1876. The constitution makes it his duty to inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any such corporation from exercising any power or demanding or collecting any species of taxes, toll, freight, or wharfage not authorized by law, and whenever sufficient cause exists to seek a judicial forfeiture of such charters unless otherwise expressly directed by law, etc. Such proceedings he may take, perhaps, without the direction of the governor, but nowhere does the constitution confer upon him power to institute or maintain in the name of the State, at his mere will and pleasure, suits against citizens, and for any cause or purpose that may satisfy his whim or pleasure, except those above specified. The governor is, under the constitution, the chief executive officer of the State, and the attorney general should not be allowed to usurp his prerogatives. The State may waive the right or action or forbear at pleasure. Whether it will do so is, as a rule, a question for the legislature to determine. If the legislature has not acted, then, if it is a matter pertaining to executive action, the right to act is vested in the governor unless otherwise bestowed by the constitution or by statute. Unless precedents set up by the attorney general himself in recent years, and as yet without sanction by this court, have changed what might otherwise be reasonably assumed to be fundamental law, the attorney general, by virtue of his office, has no right or power to represent or act for the State and exercise its sovereign functions and prerogatives unless expressly or by clear implication authorized so to do by the constitution or statutes of the State. We have seen that, outside of representing the
225 State in the suits to which it is a party in the appellate courts, the only suits the attorney general is by the constitution authorized to institute and maintain are actions to prevent private corporations from exercising power and exacting charges not authorized by law and for the forfeiture of the charter of such corporations where sufficient cause therefor may exist. When we turn to the statutes we find that wherever the legislature has deemed it proper for the attorney general to institute suit in behalf of the State it has conferred upon his specific authority in that behalf. It has authorized him to institute suit to escheat land unlawfully held by aliens (Rev. Stat. 1895, art. 14); to inspect the accounts of certain officers and institute suit for the recovery of funds in their

hands (art. 2892); to institute suits against corporations for exercising power or exacting charges not authorized by law (art. 2901); to proceed by *quo warranto* against those holding offices or exercising franchises to which they are not entitled by law (art. 4343); to proceed against railway companies for failure to maintain offices in this State (art. 4369) and for failure to make reports, etc. (art. 4375); to proceed at the instance of the railroad commission, by suit, for the recovery of all penalties prescribed by the act creating the railroad commission (art. 4579), etc.; but nowhere has the legislature conferred upon him general power to exercise at will the sovereign right of the State to institute and maintain suits. It has specified particularly, and often with restrictions and limitations (art. 14, 4568), cases in which he may proceed without instructions from the governor by suit in behalf of the State. The general power the legislature not only withheld from the attorney general, but expressly conferred upon the governor by R. S., art. 2907, which reads as follows:

"The governor is hereby authorized to order, through the
226 proper officials, the institution, prosecution, or defense of any civil action or suit whenever he deems such course proper for the assertion or defense of any right of the State, and to render to said officials such assistance as to him may be necessary or expedient."

It is a fact of some significance that this article is embraced in the chapter of the Revised Statutes relating to the powers and duties of the attorney general. If this article had been omitted from the statute, still the attorney general would be without power to institute this suit, because it is, as we said before, a sovereign power, belonging, in the first instance, to the legislature, and devolving, in the next instance, upon the governor as the chief executive officer of the State; but, existing as it does, it is an express denial of the power to the attorney general and evinces the purpose of the law-making power to vest it in the governor, where it properly and ordinarily belongs.

The power of the attorney general seems to be that of regulating and keeping within the bounds of the law the matters entrusted to him by the law; but we fail to find an instance in the law where he is authorized, at his will or pleasure, to institute proceedings to set aside the solemn act of the State already done upon the report of its own officers. To warrant him in so doing he must have express authority by general law or special authority in the particular case. Otherwise all acts of the State are subject to his inquiry at his will or pleasure.

We submit, therefore, with confidence that it was necessary for the attorney general to show that he had been ordered by the governor to institute this action, and that without such order he has no more power than any other citizen to proceed by an action in the name
of the State. He neither alleged, produced, or proved such
227 order in any way, but assumed the authority by virtue of his office or of some law to which no one refers and which we assert does not exist. If there is an exception conferring upon

the attorney general the power to institute and maintain an action of this character to the general rule conferring the discretion upon the governor by the statute above quoted, it must be found in some express provision of the statute or constitution, and no such provision exists. The action of the attorney general, therefore, in this case is as much in excess of his lawful power and beyond the authority of the law as he claims the action of the commissioner of the general land office to have been, and is an usurpation of power conferred upon the governor and an effort to exercise a power of the State never granted to him by law.

Fifth.

Validity of File.

The said court of civil appeals erred in overruling and holding not well taken petitioners' fifth assignment of error, complaining, in effect, of the action of the court below in not finding and holding that the file made by petitioner railway company on July 28th, 1872, upon the land in question was superior to and unaffected by the reservation sought to be made in favor of the Texas and Pacific Railway Company by the special act of May 2d, 1873, and that said file was valid, notwithstanding said special act.

Statement.

See Petitioners' Brief, pages 8, 9, and the fifth and thirty-first ground- of the motion and amended motion for rehearing; see the file made through R. M. Elgin on the 28th day of July, 1872 (Trans., 104–106); see also the map in the general land office showing all the lands involved in this suit (except two sections)
228 embraced in the boundaries thereof (Trans., 134). The special act assuming to make the reservation in favor of the Texas and Pacific Railway Company was passed May 2, 1873, but was not approved by the governor. (Special Laws 1873, pages 318–327.)

Authorities.

Chap. CVIII, Special Laws 1873, 318, section 5 of which expressly preserved existing rights of third persons.

Sayles' Civil Statutes, art. 3897, providing that such entry or application shall confer a preference right of location or survey over any subsequent entry or application, and art. 3902 (act of February 10, 1852), allowing twelve months after entry within which to have the land surveyed.

That the right of the owner of a certificate attaches at the date of his file see—

Montel *v.* Speed, 53 Tex., 339.
Hamilton *v.* Avery, 20 Tex., 635.
Sherwood *v.* Fleming, 25 Tex. Sup., 408.
Milam County *v.* Bateman, 54 Tex., 163.
Gullett *v.* O'Connor, 54 Tex., 408.

Sixth.

General and Special Laws Relating to Railway Company.

The said court of civil appeals erred in overruling and holding not well taken petitioners' seventeenth assignment of error, which in effect complained of the action of the court below in rendering judgment against petitioners and in holding that petitioner railway company was not entitled to the land grant in question under the general law of January 30th, 1854, granting lands to encourage the construction of railroads, and the laws of 1862 and 1866 and the special law specifically extending the benefits of the general law of January 30th, 1854, to petitioner railway company for the construction of its road to Austin, and also in not holding that by analogy to the constitutional provisions suspending the statutes of limitation the time for construction was suspended till March 30, 1870.

229 *Statement.*

The Houston and Texas Central Railway Company was originally incorporated under the name of the "Galveston and Red River Railway Company," with authority to construct a railway from a point on Galveston bay or its contiguous waters to a point on Red river, by the special act of March 11th, 1848 (Special Laws 1848, chap. 204, pages 370–373). No lands were granted by that act. The next act relating to said railway company was a special act approved February 14th, 1852 (Special Laws 1852, chap. 148, pages 142–147). By section 14 of this act eight sections of land of 640 acres each for every mile of railway it should construct *was* granted to the company, and regulations were prescribed with reference to the location of the land and the construction and operation of the company's railway. By the special act of February 7th, 1853 (Special Laws 1853, chap. 19, page 36), the action of the incorporators in commencing the survey and grade of said company's railway at the city of Houston was approved and confirmed. Section 2 of that act authorized and empowered the company "to extend said railway to the city of Galveston, and also to make and construct, simultaneously with the main railway described in the original acts establishing said company, a branch thereof towards the city of Austin under the same restrictions and stipulations provided in said original acts, etc." By the special act approved *approved* January 23d, 1856 (Special Laws 1856, chap. 20, pages 28–30), the "rights, benefits, and privileges of the general law of January 30th, 1854, granting lands to encourage the construction of railroads," was extended to said company upon the conditions (1) that it should construct twenty-five miles of road each year after January 30th, 1856; (2) that it should keep its principal office on its line of road, with all books, papers, and accounts, subject to the inspection
230 of any stockholder; (3) that a majority of the directors should reside in the State, and all elections of directors and other officers should be held in the State; (4) that the company

should complete its main trunk road to the 32nd degree of north latitude or a connection with some road reaching to or in the vicinity of Red river before it should commence any branch road; (5) that the company should be subject to the general acts of February 7th, 1853, establishing regulations for the government of railway companies, and (6) that upon application by it for the benefits of said act of January 30th, 1854, it should prove to the satisfaction of the governor that it had established and kept its principal office on its line of road. This act also (sec. 4) authorized the company to mortgage all its property, and after location and survey or patent to mortgage the lands granted to it. Section 5 required it to yield "all general branching privileges except such as are expressly granted by the provisions of its charter to certain points, etc." Section 6 provided that "nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30th, 1854, entitled An act to encourage the construction of railroads in Texas by donations of land, provided that the right to lands acquired before said repeal or modification shall in all cases be protected." By the special act of September 1st, 1856 (Special Laws 1856, pp. 259, 260), the name of the company was changed to the "Houston and Texas Central Railway Company," and it was given further time to construct certain sections of its road. By the special act of February 4th, 1858 (Special Laws 1858, chap. 86, pp. 94, 95), the company was authorized to extend its road beyond the limits of the State into the Indian Territory and the Territory of Kansas, and by section 2 of said act it was also provided as follows:

"That the failure of the Houston and Texas Central Rail-
231 way Company to complete the third section of twenty-five miles of its road by the 30th day of July, 1858, shall not work a discontinuation as to the said company of the benefits of the act to encourage the construction of railroads in Texas by the donation of land or any other general laws in reference to railroads if said company shall complete said third section by the 30th day of July, 1859, and that on the completion of subsequent sections of twenty-five miles annually after said 30th day of July, 1859, or fifty miles every two years, said company shall be entitled to sixteen sections of land per mile, contemplated in said last-mentioned act, for each section so completed, and whenever a failure shall occur on the part of said company to complete a section within the time required, then the land applicable to that section only shall be forfeited and the completion of future sections within the time contemplated by law shall entitle the company to the benefits of said last-mentioned act as fully as if no failure had been made in completing any former section, except as to the section on which the failure occurred, provided that the benefits of the provisions of any general law shall only inure to the said railroad company whilst said laws shall remain in force."

By two general acts approved January 11th, 1862, it was provided that the failure of any railway company to complete any section or fraction of section of its road, as required by then existing laws, should not operate as a forfeiture of its charter or of the lands to

which it would be entitled, provided it should complete such section or fraction of section within two years after the close of the war (Gen. Laws 9th Leg., 1st ses., chap. 62, pages 43, 44, and chap. 69, pages 46, 47). By both of said acts it was provided as follows:

"The president and directors of the Houston and Texas Central Railroad Company shall before the provisions of this act
232 shall extend to the benefits of said company pass a resolution restoring the original *bona fide* stockholders of said company—those who have paid for their stock—to all the rights, privileges, and immunities to which they were entitled previous to and of which they were divested by the sale of said road to W. J. Hutchins and others, and shall forward to the governor of the State a copy of said resolution, signed by the president and countersigned by the secretary or treasurer under the seal of said company, and said company shall not have the power to repeal said resolution so as to defeat the object of this act: Provided, that if the said original *bona fide* stockholders should fail to pay into the treasury of said company ten per cent. upon their said stock on or before the expiration of the extension of time provided in this act for the fulfillment of the charter obligations of said company to the State, then and in that case said stockholders shall forfeit all their rights, privileges, and property interests as stockholders in said road."

The proof showed (Trans., 128, 129) that the directors of said railway company passed the resolution required by the act, restoring the stockholders in the company before the sale of the property to their privileges as such, and the court below found as a fact that the resolution required by the act had been passed. (Sixth finding of fact, Trans., 52; 3rd conclusion of law, Trans., 57.)

By the general law of November 13th, 1866 (Gen. Laws 1866, chap. 174, p. 212) the grant of sixteen sections of land to the mile to railroad companies theretofore or thereafter constructing railroads was extended, under the same restrictions and limitations theretofore provided by law, for ten years after the passage of that act, and it was provided in section 4 of said act "that all tap roads over twenty-five miles long shall be entitled to the benefits of this act."

233 The special act approved September 21st, 1866 (Special Laws 1866, chap. 11, pages 33, 34), provided that said company should receive from the State a grant of sixteen sections of land of 640 acres each for every mile of road it had constructed or might construct and put in running order "in accordance with the provisions of the charter of said railroad company," less the land theretofore received by the company under the general law of January 30th, 1854; and provided that said company should construct and put in running order a section of twenty-five miles of additional road to that then built within one year from January 1st, 1867, or fifty miles within two years from that date, and should complete its road to Bryan station by September 1st, 1867. By the special act of August 15th, 1870 (Special Laws 1870, chap. 148, pages 325–328), section 4, the State waived forfeiture of any of the rights or privileges secured to the company by failure to comply

with the conditions of the special act of September 21st, 1866, as to construction, and provided that the company should have and enjoy all the rights and privileges secured to it by existing laws, the same as if such conditions had been in all respects complied with.

Article XII, section 43, of the constitution of 1869 reads as follows:

"The statutes of limitation of civil suits were suspended by the so-called act of secession of the 28th of January, 1861, and shall be considered as suspended within this State until the acceptance of this constitution by the United States Congress."

Authorities.

Act March 11, 1848, Special Laws 1848, p. 370.
Act February 14, 1852, Special Laws 1852, p. 142.
Act February 7, 1853, Special Laws 1853, p. 36.
Act January 30, 1854, Gen. Laws 1854, p. 11.
Act January 23, 1856, Special Laws 1856, p. 28.
Act September 1, 1856, Special Laws 1856, p. 259.
234 Act February 8, 1861, Special Laws 1861, p. 11.
Acts January 11, 1862, Gen. Laws 1862, pp. 43 and 46.
Acts September 21, 1866, Gen. Laws 1866, p. 33.
Act November 13, 1866, Gen. Laws 1866, p. 212.
Acts August 15, 1870, Special Laws 1870, p. 325.
Constitution 1869, art. XII, sec. 43.
Quinlan *v.* H. & T. C. R'y Co., 34 S. W. Rep., 738.

Argument.

The company, having been chartered before the enactment of the general law of January 30th, 1854, was entitled to the benefits conferred by that act. Further legislation was not required to enable it to enjoy those benefits. By section 2 of its original act of incorporation the company was granted "the privilege of making, owning, and maintaining such branches to the railway as they may deem expedient." Under that act the company had the right to project branches almost at will, and might have extended to Austin. But it may be said that section 12 of the general act of January 30th, 1854, provided that any company then entitled by law as this was to receive a grant of eight sections of land per mile, accepting the provisions of the act, should not be entitled to receive any grant of land for any branch road, and it may be argued therefrom that the company was under that act only entitled to receive sixteen sections of land per mile for the construction of its main line to Red river. We find, however, that by the special act of February 7th, 1853, the company was expressly authorized "to make and construct simultaneously with the main railway described in the original acts establishing said company a branch thereof towards the city of Austin under the same restrictions and stipulations provided in said original acts," and that by the special act of January 23d, 1856, the legislature expressly conferred upon the company the

rights, benefits, and privileges granted by an act approved January 30th, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of land," in consideration of which the company was required to yield several important rights or privileges assumed to be possessed by it, and by section 5 was required to "yield all branching privileges, except such as are expressly granted by the provisions of its charter to certain points," etc. The right to construct to Austin had been already granted, as we have seen, by the special act of February 7th, 1853, and all other branching privileges were required to be surrendered. The right to construct to Austin had become a part of its franchises. That road was a part of the line which it was authorized to construct. Now, we submit that the purpose and effect of the act of January 23rd, 1856, was to confer upon the company the land grant for all road the company was authorized to construct. There could be no other object in expressly applying the benefits of the act of January 30th, 1854, to the company. It was already entitled, as we have seen, to the benefits of that act for the construction of its main line at least. Why, therefore, extend the act to it unless it was for the purpose of conferring the right to the land grant for the construction of the Austin line, which the company had been authorized expressly to construct by the act of February 7th, 1853? It was to confer the additional privilege or franchise upon the company, and the grant was not without consideration. The company had to bind itself (1) to maintain its principal office and keep its records on its line of road; (2) that a majority of its directors should reside in the State, and its meetings for election of directors and officers should be held in the State; (3) to complete its main line to a certain point before commencing the branch road; (4) had to submit itself to the general act of February 7th, 1853, regulating railroads, and (5) had to yield all general branching privileges except for the branch to Austin. It is no answer to the claim of consideration to say that it might have been required to do all these things, except the last, anyway, for certainly the legislature did not consider that such power was possessed by it beyond dispute, and certainly it could not have been deprived by the legislature against its will of the general branching privileges conferred by its original charter.

Moreover, the legislature frequently extended the benefits of the general act of January 30th, 1854, to railroad companies not otherwise entitled thereto. Originally the act applied only to companies chartered before its passage, yet it was extended in many instances to companies thereafter created (Quinlan *v.* H. & T. C. R'y Co., *supra*). If by a subsequent act the benefits of the general law could be extended to companies chartered after as well as before its enactment, why might it not also be extended to a company for the construction of a branch line?

The following language used by this court in the Quinlan case is applicable here:

"Section 18 of its charter extends to the Waco Tap Railroad

Company in express terms the privileges of earning lands which were granted to other railroad companies by the general law of January 30th, 1854. The meaning of the section is as clear as if the provisions of the general law had been repeated in the act. It incorporates the privileges of that law and makes them a part of the special charter. By reference to the act we note what the privileges were which were intended to be granted. The practice of making the provisions of one statute applicable to another by a reference to the former law in the new act is of frequent occurrence in legislation both in England and in this country, and such legislation has been uniformly recognized as valid, as far as we have been able to discover."

Such also was the object and purpose of the special act of January 23rd, 1853, expressly extending to this company "the
237 rights, benefits, and privileges granted by the act of January 30th, 1854." The company was already entitled, as we have seen, to the benefits of that act for the construction of its main line. It would have been idle and useless, therefore, for the legislature to have incorporated that provision in the act of January 23rd, 1856, extending the benefits of the general act of 1854 to the company, unless it was for the purpose of extending it to the line to Austin, which, as we have seen, the company had been authorized by the special act of February 7th, 1853, to construct. Effect must be given to the act, and the only effect of the provision stated was to extend the right to lands for the construction of the Austin line. If it had not that effect, then it had no effect, and the legislature meant nothing by it. The extension of the right, as made by the act of 1856, was of "the rights, benefits, and privileges" of the act of 1854, without other restriction than construction. The Austin line, which, as the law stood, the company was authorized to construct, was not excepted. Section 5, as we have seen, required the company to yield all branching privileges except for the line to Austin, and this evinces the purpose of the legislature not to grant lands for branches generally, but only for the main line and the line to Austin. But for section 5 the company might have constructed branches to various points, and under the act of 1856 claimed the land grant therefor, and that section was designed to guard against that contingency. There could have been no other reason for the incorporation of section 5. It is too well known to admit of dispute that the policy of the State at that time was not averse to the construction of railroads, and the construction of a multitude of branches by this company, if it could have been accomplished without State aid, would have been welcomed by the State and the people; but the State was not willing to grant lands for con-
238 struction without limit and without knowing the particular lines to be constructed and for which the land grant might be claimed. Hence by section 5 the State required the company to yield all branching privileges except for the Austin line, thereby confining the grant to the main line and the line to Austin and placing a limit upon the grant which, under the act of 1856, this company might otherwise claim.

The rights of the company under the acts referred to were preserved, and the consequence of its inability to construct its road as expeditiously as contemplated by them provided against by the special acts of September 1st, 1856, and February 8th, 1861, referred to in the foregoing statement, and by the last-mentioned act the company was given until the 30th day of January, 1863, to construct so much of its road as it should have constructed prior to that time. Before the expiration of the time thus extended the two general acts of January 11th, 1862, were passed, whereby the operation of the act of January 30th, 1854, and the time for construction were extended until two years after the close of the war (Quinlan *v.* H. & T. C. R'y Co., *supra;* R'y *v.* Kuechler, 36 Tex., 383; Davis *v.* Gray, 16 Wall., 203). The war closed August 20th, 1866 (Grigsby *v.* Peake, 54 Tex., 149; Freeborne *v.* Protector, 12 Wall., 702), instead of May 28th, 1865, as found by the court below (finding 7, Trans., 58). We have seen that both the acts of January 11th, 1862, required this company, in order to secure the benefits thereof, to restore the stockholders who had been closed out by a sale of the company's property, rights, and franchises to the position of stockholders by a resolution of its directors, which resolution was by the acts made irrepealable, and that this was complied with by the company (Trans., 128, 129), whereby an additional element of contract, based upon a valuable consideration, was incorporated into the rights of the company under the legislation referred to.

239 We submit, furthermore, that by analogy to the constitutional provision extending the statutes of limitations until the acceptance of that constitution by the United States Congress, which was March 30th, 1870, the time which elapsed between March 2d, 1867, when the first reconstruction act was passed, and March 30th, 1870, when the constitution of 1869 was accepted by Congress, is not to be computed in calculating the time within which construction was required under the acts of 1866 and prior laws. (Constitution 1869, art. XII, sec. 43.)

Within two years after the war and while the act of January 30th, 1854, and other laws in question were in force the general act of November 13th, 1866 (Gen. Laws 1866, p. 212), was passed, whereby such laws were extended for ten years more from that date. The effect of this act was to continue to railroad companies which had organized and commenced work under their charters and under the act of January 30th, 1854, the right to earn lands for construction during an additional period of ten years from November 13th, 1866. Whether these laws with respect to companies which had not acquired rights by organization and construction prior thereto were repealed by the constitution of 1869 or whether they were affected at all by that constitution we will consider later on under another ground of this application. Certainly they were not repealed and could not be under the Constitution of the United States with reference to companies which had organized and commenced construction, thereby acquiring a vested right to the benefits conferred by them (Davis *v.* Gray, 16 Wall., 203; R'y *v.* R'y, 70 Tex., 649.) This company had constructed an important part—the greater part, per-

haps—of its lines, and was diligently prosecuting the work when the constitution of 1869 was adopted; hence its rights under the laws referred to, including the act of November 13th, 1866, were unimpaired by that constitution and were in full force and
240 effect when the Austin line, on account of which the certificates in question were issued, was constructed and completed. It follows, therefore, that the company was entitled to the land sued for under those laws, and in view of the special act of August 15th, 1870, waiving forfeiture for failure to construct, etc., and that the certificates were properly and lawfully issued to it under such laws, regardless of the special act of September 21, 1866, which we shall present and discuss under a separate and subsequent ground and under which we contend that the right of the company to the lands in question is absolutely conclusive. The general act of November 13th, 1866, also removed the restrictions contained in the act of January 30th, 1854, with reference to branch lines, and expressly provided in section 4 "that all tap roads over twenty-five miles long shall be entitled to the benefits of this act," thereby conferring the right by the general law, in addition to the right conferred, as above contended, by the special act of January 23rd, 1856, for the construction of the Austin line. This law was in force when that line was constructed, and, the line being over twenty-five miles long, the company was entitled to the land grant therefor under that act, as well as under the special act last named. It is true that the act of 1854 excluded "branch" roads, while the act of 1866 included "tap" roads; but if there is any difference between "branch" roads and "tap" roads we fail to recognize or appreciate it, and certainly there should be none in law. The object of the act of 1866 was to promote by land grant the construction of the roads theretofore aided in that manner, and also the construction of all other roads intersecting with main lines, thereby securing for the State an extended system of roads, and the policy of the State and the object sought to be accomplished by the legislation and the convenience of the people would be equally subserved, whether such lines
241 were termed "branches" or "taps." There could be no magic in the name, and if there should be any distinction it must be in name only, and that, too, purely arbitrary and without any practical difference.

Seventh.

Constitutionality of Act of November 13, 1866.

The said court of civil appeals erred, in effect, in overruling and holding not well taken petitioners' eleventh assignment of error, complaining of the action of the court below in holding that the general act of November 13th, 1866, above referred to, was in conflict with the constitution, and therefore null and void.

Statement.

See Petitioners' Brief, p. 15, 8th conclusion of law filed by the court below (Trans., 58).

Authorities.

Quinlan *v.* H. & T. C. R'y Co., 34 S. W. Rep., 738.

Argument.

Since the ruling of the court below complained of this court has settled the question against that ruling by its opinion in the Quinlan case, above referred to, from which the error of the court below is obvious. That case abundantly supports this ground and renders any further discusson of the point unnecessary.

Eighth.

Special Act of February 4, 1858.

The said court of civil appeals erred, in effect, in overruling and holding not well taken petitioners' ninth assignment of error, which complained of the action of the court below in holding that the special act of February 4th, 1858, in so far as the same granted lands to petitioner company, ceased to be operative at the time the act
242 of January 30th, 1854, granting lands to railroad companies, expired by limitation.

Statement.

See Petitioners' Brief, page 13, and fifth conclusion of law filed by the court below (Trans., 58). See also special law passed February 4th, 1858 (Special Laws 1858, chap. 86, p. 94). Section 2 of this act relieved the company of the consequence of its failure to construct a certain section of its road by a given time if said company should complete said section by the 30th day of July, 1859, and provided "that on the completion of subsequent sections of twenty-five miles only after said 30th day of July, 1859, or fifty miles every two years, said company shall be entitled to sixteen sections of land per mile contemplated in such last-mentioned act for each section so completed," etc. The proviso of that section was "that the benefits of the provisions of any general law shall only inure to the said railroad company whilst said laws shall remain in force."

Argument.

The ruling complained of was doubtless based upon the erroneous view pointed out in the preceding ground, entertained by the court below, to the effect that the general act of November 13th, 1866, extending for ten years the law granting lands to railroad companies, was unconstitutional, and that therefore the general act of January 30th, 1854, expired by its own limitation two years after the close of the war. This view, as we have seen, was wrong. Since the general act of November 13th, 1866, was constitutional and extended the laws in question for ten years from the

date of its passage, the rights conferred by the special act of February 4th, 1858, continued for the same period. This act con-
243 ferred upon the company a grant of sixteen sections of land per mile for all road constructed while the general laws were in force without any restriction as to branch lines or otherwise than with respect to the time of construction. Upon the construction of road within the time mentioned in the act, and which, as we have seen, was extended from time to time by subsequent acts, the company became entitled, by virtue of the act of February 4th, 1858, regardless of other acts, to sixteen sections of land for each mile so constructed.

Ninth.

Special Acts of Sept. 21, 1866, *and Aug.* 15, 1870.

The said court of civil appeals erred in overruling and holding not well taken petitioners' twelfth assignment of error, complaining of the action of the court below in holding that petitioner railway company was not entitled to the lands in question under the special act of September 21st, 1866, granting lands to petitioner company, and in overruling petitioners' fourteenth assignment of error, which in effect complained of the action of the court below in holding that the special act of August 15th, 1870, for the relief of petitioner railway company, and which, among other things, waived all right of forfeiture by reason of any failure to construct the road, as required by prior laws, was unconstitutional, null, and void.

Statement.

See the special act entitled "An act granting lands to the Houston and Texas Central Railway Company," approved September 21st, 1866 (Special Laws 1866, p. 33), section 1 of which reads as follows:

"That the Houston and Texas Central Railway Company shall be entitled to receive from the State a grant of sixteen sections of land, of six hundred and forty acres each, for every mile of
244 road it has constructed, or may construct, and put in running order, 'in accordance with the provisions of the charter of said railroad company;' provided, that the lands heretofore drawn by said company, by virtue of an act to encourage the construction of railroads in Texas, by donation of lands, 'approved January 30th, 1854,' be deducted from the amount of lands granted hereby; and provided further, that the land certificates heretofore issued to this company, on the three first sections of their road, by virtue of the act aforesaid, be included in the terms, benefits and conditions of this act, as if issued by virtue of its provisions; and further provided, that said company shall construct, and put in running order a section of twenty-five miles of additional road to that now built, within one year from January 1st, 1867, or fifty miles within two years from that date; and such grant of land shall be discontinued when said company shall fail to construct, and

complete at least twenty-five miles of the road contemplated by their charter, each year, after the construction of said first-mentioned fifty miles of road; provided, that said road shall be put in running order to Bryan's station, and cars run regularly thereon, by the first day of September, 1867."

See, also, the special act of August 15th, 1870, sec. 4 (Special Laws 1870, chap. 148, pp. 325–328), entitled "An act for the relief of the Houston and Texas Central Railway Company." See, also, Brief, pages 16–19. See conclusions of law 9 and 10, filed by the court below. (Trans., 58.)

Argument.

Strange as it may seem, the attorney general has not as yet attacked the validity of the special act of September 21st, 1866, above referred to. It is impossible for us to conceive of any grounds upon which he could do so. It was obviously within the power of the legislature at the time to make the grant;
245 and that it conferred the grant for the line to Austin, as well as for the main line, has not been and cannot reasonably be disputed, for it was "for every mile of road it has constructed, or may construct, and put in running order in accordance with the provisions of the charter of said railroad company." His contention is (Appellee's Brief, p. 8) that the company lost the right by the failure to construct as expeditiously as that act required. There are several effectual answers to this contention, one of which is that the executive officers of the State having determined the fact of construction and issued the certificates, that question is concluded and is not open to inquiry in this connection; but that answer we shall present fully in support of a subsequent ground of this application, where it more appropriately belongs. Another is that the State not only failed to claim the forfeiture by any appropriate proceeding to declare it, but expressly waived it by an act of the legislature. This was accomplished by section 4 of the act of August 15th, 1870, providing that "no forfeiture of any of the rights or privileges secured to it by existing laws shall be enforced against the said Houston and Texas Central Railway Company by reason of its failure to comply with the conditions as to construction imposed by the first section of the act of the twenty-first of September, A. D. 1866, entitled 'An act granting lands to the Houston and Texas Central Railway Company,' but said company shall have and enjoy all the rights and privileges secured to it by existing laws the same as if the conditions embraced in the first section of the act of the twenty-first of September, A. D. 1866, had been in all respects complied with, etc." But the court below and the court of civil appeals hold this act unconstitutional and void. This holding could only have been upon the ground that the act undertook to grant lands, but if there is any provision of the act assuming
246 to make such grant, it is not pointed out. The court of appeals, in their opinion (page 2), seemed to assume that the right to construct a line to Austin was conferred for the first time

by this act, and in that manner they seem to endeavor to stretch the opinion of this court in G., H. & S. A. R'y Co. *v.* State, 34 S. W. Rep., 749, to sustain their ruling. In that case the court held that the right of the Galveston, Harrisburg and San Antonio Railway Company to construct a line to San Antonio did not exist until it was conferred by the act of July 27th, 1870. In this case the right of this company to construct a line to Austin, aside from the general branching privileges conferred by the original act of incorporation, passed March 11th, 1848, was expressly conferred, as we have already seen, by the act of February 7th, 1853 (Special Laws 1853, p. 36), and was preserved throughout the subsequent legislation relating to this company. The right, therefore, beyond any sort of question, to construct a line to Austin, existed before and wholly independent of the act of August 15th, 1870. That act, upon this point, merely merged the Washington County railroad into and made it a part of the Austin line, and reiterated the authority previously granted to the company to extend the line to Austin. It could have paralleled the Washington County railroad and could have secured the Austin line by construction throughout. The legislature perceived the lack of any necessity, and indeed the folly of this, and evinced the wisdom of confirming the acquisition of the Washington County railroad and the merging of it into the Central as a part of the Austin line, thereby saving the land—about 336 sections, or 214,040 acres, which the company could have earned by constructing another instead of purchasing the existing line. That the legislature had the power to do this no one, we apprehend, will deny. The Washington County railroad was thereby made merely a part of the line to Austin, which the company
247 had before been authorized to construct. The difference between this case and the case cited by the court of appeals is obvious. The lands had been granted by prior laws, particularly the special act of September 21, 1866, about the validity of which there can be no serious question. The right thereto under such laws existed subject to any ground of forfeiture that may have arisen by reason of the failure of the company to construct its road within the time contemplated by those laws. Now, what we claim with reference to this point by virtue of the act of August 15th, 1870, is that the State thereby expressly waived any and all such grounds of forfeiture. That section 4 was intended to have this effect admits of no question, and that such was its effect, if valid, is absolutely clear. Was it valid? There was nothing in the constitution of 1869 preventing the legislature from waiving any forfeiture of lands granted railway companies, except for the failure to alienate the same (constitution 1869, art. X, sec. 7). Unrestrained by the constitution, the legislature, beyond question, had the right, as it did by the statute referred to, to waive any ground by reason of delay in construction that may have existed for the forfeiture of the lands granted to this company by the prior laws which we have discussed. Indeed, it could do more. Where the right had accrued under laws passed prior to the constitution of 1869, the legislature, as was held by this court in Holmes *v.* Anderson, 59 Tex., 481, had the right

thereafter to pass laws to complete or perfect that right, and this notwithstanding the fact that such right might have been perfected under existing general laws. We have no occasion to invoke that principle here, but refer to it as a refutation of the apparent impression in some quarters that the constitution of 1869 absolutely paralyzed the power of the legislature with respect to private
248 land grants made before as well as after its adoption. It seems to us too clear to require further argument to show that section 4 of the act of August 15th, 1870, was in all respects valid. The reference by the attorney general, on page 7 of his brief, to the "supposed act of August 15th, 1870," indicates a disposition to make further question respecting that act, which stands so much in his way. It is true that the political household of the then governor, especially his secretary of state, whose disposition was to rule or ruin (and generally both), sought to discredit the act by procuring ex-employés of the legislature to endorse unauthorized statements on the act in the office of the secretary of state, as shown on the original enrolled bill and as appended to the act as published in the special laws of that session (pages 328–330). Of course, this effort to override and defeat the will of the legislature with respect to a matter within their power failed, and all question in reference to this identical act upon this point was set at rest by this court long ago in H. & T. C. R'y Co. *v.* Odum, 53 Tex., 343.

It is contended, however, that the right to the land grant given by the act of September 21st, 1866, had been forfeited by the failure to complete certain parts of the road before the act of August 15th, 1870, was passed. There are, we submit, two conclusive answers to this contention. The first is that the forfeiture had not been declared by any judicial proceeding for that purpose or by any act of the legislature equivalent to a judgment of "office found" at common law, and it seems entirely clear that one of these was necessary. We submit that this point is absolutely settled by the Supreme Court of the United States in St. L., etc., R. Co. *v.* McGee, 115 U. S., 469, 473, 474; Van Wyck *v.* Knevals, 106 U. S., 360, and Bybee *v.* Oregon, etc., R. Co., 139 U. S., 663, 675, and by other cases in that court, as well as in other courts. It is also settled, in effect,
249 by the decision of this court in G., H. & S. A. R'y Co. *v.* State, 81 Tex., 572, though the court did not go and was not called upon in that case to go as far as it might have gone. In St. L., etc., R. Co. *v.* McGee, *supra*, the act of Congress under consideration provided that if the road was not constructed within ten years from the time the act went into effect "the lands granted or the grant of which is revived or extended by this act, and which at the time shall be unpatented to or for the benefit of the road or company, shall revert to the United States," and the court said:

"It has often been decided that lands granted by Congress to aid in the construction of railroads did not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose or through some legislative action legally equivalent to a judgment of office found at common law. * * * Legislation to be

sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture and a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity."

None of the Texas acts in question are as strong as the act of Congress referred to. The latter declared that upon the failure to construct the road within the time named the land "shall revert to the United States." Of course, it is not claimed that any judicial forfeiture was ever sought by the State, and the question then arises whether there was any "legislative action legally equivalent to a judgment of office found at common law," and we have seen that "legislation to be sufficient must manifest an intention" by the legislature "to reassert title and to resume possession," and that "as it is to take the place of a suit" by the State "to enforce a
250 forfeiture and a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity" (115 U. S., 473, 474). Where is there any such legislative action? No act was ever passed by the legislature declaring these lands forfeited and reclaiming them to the State. Not one word indicating any such intention upon the part of the legislature is found in the statutes. On the contrary, we have seen that, instead of enforcing any right of forfeiture that might have existed, the legislature by the special act of August 15th, 1870, expressly waived it. It is absolutely clear that there has been neither a judicial nor a legislative enforcement of any right of forfeiture with respect to these lands. If we may consider the constitution of 1869 as "legislation" in the sense here used, obviously it contains nothing "legally equivalent to a judgment of office found" with respect to this matter. Article X, section 6, at most only prohibited grants. It did not forfeit grants, and section 7 only assumed to forfeit lands for the failure to alienate the same as acquired by law and not for failure to construct. There is absolutely nothing in that constitution that could, without doing violence to settled law, be construed as equivalent to a forfeiture of these lands for a failure to construct the road as required by the acts granting them. There is not only no such description of the land or the grant and no specific reference to them at all as is absolutely necessary under the authorities in every case of legislative forfeiture, but there is no forfeiture at all, by general terms or otherwise. The action of the executive department is also important in this connection. They recognized the validity of the grant and the right of the company to the lands in question. They never asserted any forfeiture and took no action indicating that they understood that any forfeiture was in-
251 tended by the constitution of 1869 or sought to be enforced in any manner by the legislature, but, on the contrary, the governor, whose hostility to such grants was violent and who was ever ready to dispute them, appointed an engineer to inspect the road as a basis for the issuance of certificates, and in pursuance of such inspection they were issued by the commissioner of the general land office. No proceeding to enforce and declare a forfeiture

by judicial decree was ever authorized by any of the eminent men who have since filled the office of governor.

It would seem, therefore, that our claim that there could be no forfeiture of the lands in question for failure to construct without a judgment to that effect in an appropriate judicial proceeding or some legislative action legally equivalent to a judgment of office found is absolutely conclusive. In this connection we desire also to call the court's attention to United States *v.* Williamette, etc., Co., 54 Fed. Rep., 807, and United States *v.* Williamette, etc., Co., 53 Fed. Rep., 711, the opinions having been delivered by Circuit Judge Gilbert, in which, among other things, it is held that forfeitures for the breach of the condition that the road should be completed in a specified time could only be enforced by legislative enactment or judicial proceeding, in the absence of which the road might be completed, and forfeiture thereby prevented, even after the time limited had expired. While they are not binding as authority, yet the distinguished ability of the judge who decided them gives them weight, and they are, moreover, in line with principles running through cases in the Supreme Court of the United States.

Another answer equally conclusive to the contention of the State that the right to the land grant given by the act of September 21st, 1866, had been forfeited by the failure to complete certain parts of the road before the act of August 15th, 1870, was passed is
252 that the road having been in fact constructed as required by law, and the fact of construction and completion having been ascertained and determined by the executive department of the State charged with that duty, and the certificates issued accordingly, the time of such completion is not open for further inquiry by the court, especially in a collateral proceeding. There is no legislative act, no judgment of record, to indicate that the road was not completed within the time required by law—nothing to put any one on notice or even inquiry as to that fact—but, on the contrary, the action of the executive department in the issuance of the certificates affords evidence, and, indeed, conclusive evidence, that the road was constructed as required by law. We shall not pursue this point further here, but reserve it for discussion under another ground of this application.

There is still another answer which seems conclusive. The convention which framed the constitution of 1869 by a declaration "for the relief of the Houston and Texas Central Railway Company," passed December 23rd, 1868, declared (Ordinances Convention 1869, page 59):

"It is hereby declared by the people of Texas in convention assembled that the Houston and Texas Central Railway Company shall not suffer any forfeiture of any rights secured to it by existing laws by reason of the failure of said company to construct and put in running order their said railway to the town of Calvert, in Robertson county, by the first day of January, A. D. 1869, as required by the act of the twenty-first of September, A. D. 1866, provided said railway shall be constructed and put in good running order

for the use of the public to the said town of Calvert by the first day of April, A. D. 1869."

We are aware that this court held in the Quinlan case that the convention which framed the constitution of 1869 was without
253 general power to legislate. The declaration above quoted, however, was not legislation of the character in question in that case. It was a declaration by the only organ of the State existing at the time, the only representative of the will and expression of the voice of the people. The declaration in question was not a measure designed to direct and control the action of the people and was not intended to impose a liability upon the citizen, as was the ordinance under consideration in the Quinlan case. It was merely an expression and declaration of the will and purpose of the State by the only organ or representative of its civil existence to waive a ground of forfeiture which the State had the power to waive, which it was appropriate that it should waive, and which at that time, perhaps, could be waived in no other way. We earnestly submit, therefore, that the declaration was essentially different in character and purpose from that in question in the Quinlan case, and that it was one which the convention, as the representative of the people of the State, had the right to make. Certainly it seems to us that under the decisions of this court in Stewart *v.* Crosby, 15 Tex., 546, and Grigsby *v.* Peake, 57 Tex., 142, particularly the latter case, holding the ordinances of that convention to be valid, the above declaration ought to be held as coming within the powers of the convention. The most prudent person would have been warranted in so regarding it under the decisions in those cases, and in view of the property rights which have vested upon the faith of the law as thus declared and understood it does seem that the court should be slow to overturn its solemn adjudications of former days when only injustice will result therefrom and when not demanded by any principle of public policy or private right.

We insist, therefore, with confidence that the company was clearly entitled to the lands in question under the general laws of 1854, 1862, and 1866 and the special laws relating to it, and par-
254 ticularly the special law of September 21st, 1866, and that such rights were never forfeited for these reasons, among others, either one of which is conclusive, viz: (1) Any ground of forfeiture that may have existed was expressly waived, not only by section 4 of the special act of August 15th, 1870, but also by the declaration of the constitutional convention of 1868–'9; (2) there was never any legislative or constitutional forfeiture or act equivalent to judgment of office found, and there was never any enforcement of any ground of forfeiture by judicial decree without one of which there could be no forfeiture, and (3) the executive department charged by law with that duty determined the fact as to the construction, and found that it was in accordance with the laws of the State and issued the certificates accordingly, and such finding is not open to further inquiry.

Tenth.

Constitution of 1869 *with Reference to Repeal.*

The said court of civil appeals erred in overruling and in holding, in effect, not well taken petitioners' seventh assignment of error, which complained of the action of the court below in not holding that the laws of January 11th, 1862, and their acceptance by petitioner company, restoring the stockholders to their original position in consideration of the grant and benefits of that act to this company, *was* a contract between this company and the State, entitling it to all the benefits of the act of 1854 and the several amendments and supplements thereto granting lands to railway companies within the protection of the Constitution of the United States and denying any State the power to pass any law impairing the obligation of contracts, and in overruling petitioners' eighth assignment of error, complaining of the action of the court below in holding that the special act of January 23d, 1856, authorized the repeal of the said act of 1854 in so far as the same affected this company.

255 *Statement.*

See Petitioners' Brief, pages 11, 12, findings of the court below (Trans., 57, 58), Gen. Laws 1862, chap. 62, p. 43, sec. 2, and chap. 69, pp. 46, 47, sec. 4. That provision of the special act of January 23d, 1856 (Special Laws 1856, chap. 20, p. 28), upon which the ruling of the court below complained of in the eighth assignment of error was based is found in section 6, which reads as follows:

"SECTION 6. That nothing in this act shall be so construed as to effect (affect) the right of the State to repeal or modify the act of January 30th, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of lands,' provided that the rights to lands acquired before said repeal or modification shall, in all cases, be protected."

Authorities.

Railway Co. *v.* Kuechler, 36 Tex., 383.
Railway Co. *v.* Groce, 47 Tex., 437.
Railway Co. *v.* Railway Co., 70 Tex., 656, 657.
Davis *v.* Gray, 16 Wall., 203.

Argument.

Of course, no one contends that the legislature ever repealed any of the laws in question before the completion of the road and the issuance and location of the certificates. It is contended, however, that such repeal was accomplished by article X, section 6, of the constitution of 1869, which reads as follows:

"SECTION 6. The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres."

256 But for the contention of the attorney general in cases of this character and some expressions here and there in the reports of this court, it would not seem to be necessary to advance any argument to show that this provision of the constitution did not have the effect to repeal existing laws granting lands to aid in the construction of railroads. It has none of the elements of a repealing act and embraces no language appropriate to that object. Certainly it would seem that if it was intended to repeal existing laws language usually employed for that purpose or some appropriate words would have been used to express such intention, especially as such intention would have been to revolutionize the settled policy of the State and at variance with the uniform will of the people and the legislature, as expressed in numerous statutes. To hold this provision a repeal of existing laws in any respect or to any extent is to set at naught the principles of construction in such cases running back to the foundations of our law and to extend the ill-favored doctrine of repeals by implication, as we believe, beyond any precedent in the history of this country or of England. It seems obvious, from the language used, that the provision was intended to have prospective effect only. It did not, by its terms, undertake to repeal any law whatsoever. It did not purport to undo anything the legislature had done, but only imposed a limitation upon the power of the legislature thereafter. It did not deal with the past at all. It related entirely to the future. "It is," as said by this court, "a rule of construction to be generally adhered to in the construction of constitutions, as well as statutes, that they operate prospectively, unless the words employed or when the object in view and the nature and character of the provision clearly shows that it was intended to have retrospective operation" (Orr *v.* Rhine, 45 Tex., 345, 354).

257 We may be pardoned for stating, with some authorities, the familiar rules that repeals by implication are not favored, and where earlier and later acts can by any reasonable construction stand together they must so stand, and the latter act does not repeal the earlier unless their provisions are clearly inconsistent or repugnant (Hanrick *v.* Hanrick, 54 Texas, 108; Neil *v.* Keese, 5 Tex., 22; Laughter *v.* Seela, 59 Tex., 183; The Distilled Spirits, 11 Wall., 356–364; Anderson's Tobacco, 11 Wall., 652, 658; Davis *v.* Fairborn, 3 How., 636–644; U. S. *v.* Walker, 22 How., 399, 411; McCool *v.* Smith, 1 Black, 459, 470); that privileges granted by a special act or charter are not affected by general legislation on the same subject, but the special charter and general law must stand together, the one as the law of the particular case and the other as the general law of the land (Laredo *v.* Martin, 52 Tex., 561; Ellis *v.* Botts, 26 Tex., 707; Scoby *v.* Sweatt, 26 Tex., 728; State *v.* Stoll, 17 Wall., 425, 436; *Ex parte* Crow Dog, 109 U. S., 570; New Jersey *v.* Yarde, 94 U. S., 104–117; Gowan *v.* Harley, 12 U. S. App., 574, 584), and that repugnancy in principle will not suffice (Sutherland on Statutory Constr., sec. 137). The prohibition against the legislature making grants of land in the future is certainly not necessarily inconsistent or irreconcilable with an intention to leave the past acts

of the legislature undisturbed. It is true that in Bacon *v.* Russell, 57 Tex., 409, and G., H. & S. A. R'y Co. *v.* State, 81 Tex., 572, language may be found which can be construed to support the claim of a partial repeal by this provision of the constitution, but the question was not involved and was not decided in either of those cases, and in both it was expressly held that if it was intended as a repeal of existing laws it could not affect rights that had accrued thereunder. The question was again touched upon, but not decided, in Quinlan *v.* H. & T. C. R. Co., 34 S. W. Rep., 738, and G., H. & S. A. R'y Co. *v.* State, 34 S. W. Rep., 749, but this court
258 has never as yet decided that the provision in question operated as a repeal of existing laws to any extent, however remote. On the other hand, the question was directly involved and decided in accordance with our contention by this court in Railway *v.* Kuechler, *supra*, where it was said (36 Tex., 398):

"But it is insisted by the attorney general that all grants of land to railroad companies are destroyed and inhibited by the present constitution. We do not think so.

"The 6th section of 10th article of the constitution, which provides that the 'legislature shall not hereafter grant lands to any person or persons,' etc., is plainly prospective in its operation and was not intended to affect the claim of railroad companies to lands under former laws. It is not our information that such a meaning was claimed for it by any member of the convention when this section of the constitution was under discussion."

This construction was accepted even by Governor Davis (Trans., 131). It is quite common, we know, to question the authority of the decisions of the court as constituted at that time, but whatever may be said of the court as organized under military authority there can be no doubt that the court delivering the opinion in the case last cited was as much a constitutional court and as much entitled to exercise its functions and jurisdictions as such as the court is with its present organization. While its decisions in cases involving political questions may be disregarded because of the intense political feeling prevailing at the time and with which it is suspected the court was tainted, yet there is no reason why its opinions upon property rights should not be entitled to the force of precedent to the same extent as other decisions of this court. Indeed, we doubt if there is a volume of the reports of this court
259 published in recent years that does not contain a reference to some decision of the court as thus constituted as authority upon some point; and the decision in the case relied on did not involve some mere quasi-political question relating to the powers of government or the exercise or extent of governmental powers likely to shape the course of the Government in some important particular in the future, but it was essentially a question of property that the court determined. The distinction is clearly pointed out in Willis *v.* Owen, 43 Tex., 41. Largely upon the faith of that decision and the property rights as there settled many miles of railroad have been constructed, certificates for thousands of acres of land have been issued and located, and, as said by the Supreme Court of the

United States, "patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this date be called in question." (Kansas, etc., R. Co. *v.* Atchison, etc., R. Co., 112 U. S., 414, 418; 98 U. S., 340, 341.)

We also contend that the declaration "for the relief of the Houston and Texas Central railway," passed December 23rd, 1868 (Ordinances Convention 1868–'69, page 59), (and which we have discussed under the ninth ground of this application, *ante* —) is at least a circumstance entitled to great weight to show that the framers of the constitution did not intend to impair any of the rights of this company to the land grant in question, and the proceedings of the convention fully warrant the observation of the supreme court in the Kuechler case (36 Tex., 398), respecting art. X, sec. 6, that "it is not our information that such a meaning was claimed for it by any member of the convention when this section of the constitution was under discussion."

We insist, therefore, that the constitution of 1869 was not
260 intended and did not have the effect to repeal any laws granting lands to railroads passed before its adoption, and that such laws were unaffected in any manner or to any extent by it, and this regardless of any question whether construction had commenced and money expended under such laws before the adoption of that constitution; in other words, the provision of the constitution had a prospective effect only and related entirely to future grants, leaving absolutely untouched existing laws. This conclusion is unavoidable unless it was a repealing act, and its language, we submit, excludes that idea. It is unnecessary, however, to go so far in this case, because it is not open to question that this company had proceeded under such laws and constructed the greater part of its line before the constitution of 1869 was adopted, thereby securing a vested and contract right, which cannot be taken away without violating the Constitution of the United States. This is recognized not only by decisions of this court (G., H. & S. A. R'y Co. *v.* State, 81 Tex., 572; Railway Co. *v.* Railway Co., 70 Tex., 657), but is settled by the Supreme Court of the United States in Davis *v.* Gray, 16 Wall., 203, where it is said (p. 232)—

"That the act of incorporation and the land grant here in question were contracts is too well settled in this court to require discussion. As such they were entitled to the protection of that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts. The ordinance of 1869 and the constitution adopted in that year, in so far as they concern the question under consideration, are nullities, and may be laid out of view. When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances."

Notwithstanding this decision, the attorney general has contended in other cases of this character that under Salt Co.
261 *v.* East Saginaw, 13 Wall., 373, a general land grant act is a

mere bounty law, repealable at the pleasure of the State, etc. It was decided in that case that a State may repeal a bounty law, and that no one has such a vested right in the benefits promised as to entitle him to demand the indefinite continuance of the law, but it was not decided that a State can, by the repeal even of a bounty law, impair or destroy rights which had accrued before the rep-al. The right to earn future bounties and the right to bounties already earned are very different things. In the case under discussion the plaintiff claimed the right to exemption from taxation in years subsequent to the repeal of the act conferring the exemption. The case would have been very different if, by reason of the repeal, the State had claimed taxes accruing before the repeal. There was no question as to the rights which had been earned while the bounty law was in force. Such rights the court would certainly have held to be inviolable, for, in declaring that bounty laws are not contracts, it added, "except so far as they have been actually executed and complied with" (p. 379).

But a general land grant act to promote the construction of railroads is not a mere bounty law; it discharges a duty which the State owes to its inhabitants; it imposes onerous obligations on the grantee; it secures valuable benefits to the grantor. The State is under no obligation to furnish its inhabitants with salt or aid them in the manufacture of it, but the duty does rest upon it to provide public highways. The duty is ordinarily performed through railroad corporations, which are regarded and treated as quasi-public agencies. It has long been the policy, not only of this State, but of the other States and of the United States, to encourage by State aid in lands or bonds or otherwise the construction of railroads when the undeveloped and sparsely settled condition of the country
262 does not offer sufficient inducement for the investment of capital in such enterprises. For such grants the building of the road is the contemplated and sufficient consideration. (Thomas *v.* Railroad, 101 U. S., 71, 83.)

The same court which rendered the decision in Salt Co. *v.* East Saginaw has declared that legislation similar to the acts of 1854 and of 1866 does not fall under the category of bounty laws. We refer to the case of United States *v.* Denver and Rio Grande R'y Co., 150 U. S., 1, 8, 14.

(P. 8:) "It was not a mere bounty for the benefit of the railroads that might accept its provisions, but was legislation intended to promote the interests of the Government in opening to settlement and enhancing the value of those public lands through or near which such railroads might be constructed. To induce the investment of capital in the construction of railroads through the public domain Congress had previously granted special rights, etc."

And at page 14 the court again says:

"It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature or to withhold what is given either expressly or by necessary or fair implications. In Winona and St.

Peter Railroad *v.* Barney, 113 U. S., 618, 625, Mr. Justice Field, speaking for the court, thus states the rule upon the subject: 'The acts making the grants are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyances. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.'

"Looking to the condition of the country and the purpose
263 intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act operating as a general law and manifesting clearly the intention of Congress to secure public advantages or to subserve the public interests and welfare by means of benefits more or less valuable offers to individuals or corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi-public character in or through an immense and undeveloped domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. Bradley *v.* New York and New Haven Railroad, 21 Conn., 294; Pierce on Railroads, 491."

Here, as we have seen, the rights of the company arose, not only under general laws, but under special acts as well. We deem it unnecessary to say more upon this point, because it is manifest that by the large construction by this company under these laws (and it matters not whether it was on the main line or the Austin line) the company acquired a contract and vested right which come within the protection of the Constitution of the United States.

Of the claim that the special act of January 23rd, 1856, authorized the State to repeal the act of 1854 so far as it affected this company, but little need be said. It is not claimed that the legislature ever repealed that act. We have seen that the constitution of 1869 could not have that effect; but suppose it were otherwise, the very act under which the power of repeal is claimed provides that the right to lands acquired before such repeal or modification shall in all cases be protected.

264 Eleventh.

Action of Executive Department Conclusive.

The said court of civil appeals erred in overruling and holding not well taken petitioners' thirteenth, eighteenth, and nineteenth assignments of error, each of which in effect complained of the action of the court below in inquiring into and holding that it had the right to inquire into the time when the road in question was constructed, and in reviewing and holding that it had the right to review the finding and action of the executive department of the government in regard thereto, and in not holding that the finding and action of the executive department with respect to the comple-

tion of the different sections of the road and in issuing the certificates in question was conclusive, because petitioners say that it being a matter of fact, and the executive department being charged by law with the duty of ascertaining and determining such facts, and that department having ascertained and determined them, and having found the existence thereof and of all antecedent facts entitling the company to the land grant, and having issued the certificates as provided by law, such determination, finding, and action was and is final and conclusive and not open to inquiry by the courts herein.

Statement.

See Petitioners' Brief, pages 17–19, and the statement under the sixth ground of this application, *ante*, pages 16–21.

Authorities.

Hancock *v.* McKinney, 7 Tex., 384, 440–444.
Jankins *v.* Chambers, 96 Tex., 166, 230.
Styles *v.* Gray, 10 Tex., 503, 506.
Ruis *v.* Chambers, 15 Tex., 586, 590.
Herndon *v.* Robinson, 15 Tex., 599.
Johnston *v.* Smith, 21 Tex., 722.
De Court *v.* Sproul, 67 Tex., 370.
G., H. & S. A. R'y Co. *v.* State, 77 Tex., 388.
G., H. & S. A. R'y Co. *v.* State, 81 Tex., 597.
265 Tarlton *v.* Kilpatrick, 21 S. W. Rep., 409.
State *v.* Morgan (Ark.), 12 S. W. Rep., 243.
United States *v.* Burlington and M. R. Co., 98 U. S., 334.
Van Wyck *v.* Knevals, 106 U. S., 360.
Kansas Pacific R. Co. *v.* Atchison, etc., R. Co., 112 U. S., 414.
St. Louis, etc., R. Co. *v.* McGee, 115 U. S., 469.
Bybee *v.* Oregon, etc., R. Co., 139 U. S., 663.
United States *v.* Ala. R. Co., 142 U. S., 615.
United States *v.* Union Pacific R. Co., 148 U. S., 562.
United States, etc., Land Co., 148 U. S., 31.
United States *v.* Denver, etc., R. Co., 150 U. S., 1.
Chandler *v.* Calumet Mining Co., 149 U. S., 79.
United States *v.* Budd, 144 U. S., 154.
United States *v.* Dalles, etc., Co., 7 U. S. App., 297–316.

Argument.

This is not a case of a grant of land by executive action in the absence of express legislative authority. It is not a case where the court is called upon to determine, by construction, a doubtful question whether there existed legislation authorizing the grant. It is a case where there exists more than one legislative enactment granting in express terms the lands in question. It is a case where the action of the executive department was within and warranted by the most ample provisions of statutory law. There is the gen

eral law of 1854, extended by the legislation of 1862, November, 1866, and the special legislation relating to this company, conferring the grant in question in the broadest and most unmistakable terms. There is the special act of September 21st, 1866, which even the most sanguine advocate of the forfeiture of vested rights cannot find any pretext for questioning. Leaving out of view (though we submit with confidence that it is conclusive of the question) the act of August 15th, 1870, waiving all grounds of forfeiture, it is perfectly apparent that the company was entitled, by express statutory provisions, to the lands in question, if it constructed its road within the time required by such laws. Under the most favorable view of the State's case which the wildest legal imagination can con-
266 ceive, the only possible question is whether certain sections of the road were constructed within the time stipulated in some of those acts. This is a question purely of fact. As we have seen, it is not evidenced by any legislative enactment declaring the fact and assuming to enforce a forfeiture, nor by any judicial decree in a proceeding for that purpose. The legislative, the judicial, and the registration records of the State—beyond which certainly the citizen ought not to be required to go—are absolutely silent. It is a fact resting wholly within the treacherous memory of man, and by the great lapse of time this is well nigh, if not entirely, lost. It is true that there may be here and there some *ex parte* statement or affidavit or letter bearing upon the question, but which cannot be regarded as evidence, and which probably would never come to the knowledge of one looking to the title in question.

Such is the State's case stated in its most favorable aspect. In answer to it, we submit that the court should not and cannot rightfully go into the inquiry respecting such facts. By reference to the statute we find that the grant in question was expressly authorized by the legislature by more than one act couched in the broadest terms. We find that the road has been constructed and completed and is today in full operation, as it has been for many years, reflecting upon the State the benefits and advantages sought to be accomplished by such legislation. Looking to the provision and object of the statutes, we find that they have been fulfilled by the completion of the road contemplated. We find also that the governor, whose duty it was, under the law, appointed an engineer to inspect the road, who reported that it was completed as required by law (Trans., 94–101). We find that this report was approved by the governor, who directed the issuance of the certificates (Trans., 131), and that the certificates were issued by the commis-
267 sioner of the general land office, and were duly filed and located and recognized by the executive department. In short, we find that the executive department, whose duty it was under the law and whose obligation to obey the law was as binding as is the obligation of this court and who were invested by law with exclusive and final jurisdiction in that behalf, ascertained and determined the fact of construction and compliance with the provisions of the law, and in the exercise of their lawful authority thereupon issued the certificates in question. Now, we submit, with

confidence, that this is an end of the matter. The courts have no more right to review and set aside the findings of fact by the executive department, with respect to questions of fact entrusted to that department, than the executive department has to review and set aside the judgments of the courts upon questions of law within their jurisdiction. This is a self-evident proposition and it is entitled to full application. Such findings are entitled to even more than the force of *res adjudicata*. Judgments are matters of record, and they are based upon pleadings that show the facts, if not the evidence, on which they are based. They are matters of public record. The facts upon which the executive department acted, however, were not required by law to be preserved. The jurisdiction was exclusive and the finding made final by law. What the evidence was as to the time of construction we do not know. Most, if not the best, of it from lapse of time is not now available. If, under such circumstances, the courts can review such findings and set aside the conclusions reached by the executive department without knowing what the evidence was, then the value of land titles in this State is gone and rights which were supposed to be inviolable are frittered away.

That courts will not and cannot go into such inquires and
268 assume to review the findings of fact by the executive department with respect to matters entrusted to that department has been settled by repeated decisions of this court and of the Supreme Court of the United States in language so strong and emphatic as to evidence a peculiar appreciation of the evils that would otherwise ensue. It is so appropriate and so material in this case that we may be pardoned for quoting freely from some of the cases referred to.

In the very first volume of the reports of this court it was declared by Chief Justice Hemphill that—

"The presumption of law that the public act of the public officer purporting to be exercised in an official capacity and by public authority shall be presumed to be the exercise of a legitimate and not an usurped authority is recognized in its full force." Heirs of Holloman *v.* Peebles, 1 Tex., 673, 699.

In Hancock *v.* McKinney, 7 Tex., 384, 440, the following language of the Supreme Court of the United States in United States *v.* Arredondo, 6 Peters, 729, was quoted with approval by Judge Wheeler:

"It is an universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter and its exercise is confided to his or their discretion the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred."

In Jenkins *v.* Chambers, 9 Tex., 167, 230, Judge Wheeler said:

"What evidence besides the report of the ayuntamiento was before the governor when he made the concession does not appear. In the evidence embodied in the record there is nothing to induce

the belief that the grantee did not present a meritorious
269 claim or that he was not justly entitled to the grant he obtained; but if upon the evidence the merits of the applicant were doubtful that question is not now open to discussion. The governor was constituted by the law the judge of the qualifications of the applicant. Having exercised his judgment and decided upon the question legally submitted to his cognizance, his decision is final. 'The only questions' (said the Supreme Court of the United States in the case of The United States *v.* Arredondo) 'which can arise between an individual claiming a right under the act done and the public or any person denying its validity are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for or other revision by some appellate or supervisory tribunal is prescribed by law.'"

In Styles *v.* Gray, 10 Tex., 503–506, Judge Lipscomb said:

"It is too much to require that the patentee and those claiming under her should be called upon through all time to show that every legal requisite had been complied with, and particularly to be called upon to show that proofs had been made in cases depending upon verbal or parol evidence of which no record was kept or required by law to be kept; and when it is considered that the evidence of her having the requisite qualifications to receive a headright had been subjected to the judgment and approval of the board of land commissioners of the county and had by them been approved and again examined and approved by the traveling board and finally approved by the commissioner of the general land office, who, if he had any doubts, was required by the statute to take the opinion of the attorney general, surely it is time the subject should be put at rest."

In Ruis *v.* Chambers, 15 Tex., 586, 590, Chief Justice Hemphill said:

270 "The law was susceptible of two constructions, and, the officer whose function it was to act under the law having decided, his decision could not now be disregarded without establishing a principle which might strike deeply at the validity and security of the land titles of the country."

This language of the fathers of the jurisprudence of this State is peculiarly applicable to the case at bar. See also Herndon *v.* Robinson, 15 Tex., 599; Johnston *v.* Smith, 21 Tex., 722; De Court *v.* Sproul, 62 Tex., 370, and the more recent language of this court in G., H. & S. A. R'y Co. *v.* State, 77 Tex., 388, and G., H. & S. A. R'y Co. *v.* State, 81 Tex., 597.

Turning now to the Supreme Court of the United States, we invite the court's attention to the early case of United States *v.* Arredondo, 6 Peters, 691, already quoted from. In United States *v.* Burlington, etc., R. Co., 98 U. S., 334, 341, the court said:

"All the reasons which led to the enlargement of the original grant led to its enlargement to the branches. It was the intention of Congress, both in the original and in the amendatory act, to place

the Union Pacific Company and all its branch companies upon the same footing as to land, privileges, and duties to the extent of their respective roads except when it was otherwise specially stated. Such has been the uniform construction given to the acts by all departments of the Government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."

This language was reiterated in Kansas Pacific R. Co. *v.* Atchison, etc., R. Co., 112 U. S., 414, 418.

271 In Maxwell Land Grant case, 121 U. S., 325, 381, Justice Miller said:

"We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments demand that the efforts to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who choose to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

This was reiterated in Colorado Coal Co. *v.* United States,
272 123 U. S., 307, 316, and in United States *v.* Budd, 144 U. S., 154, 161. In United States *v.* Ala. R. Co., 142 U. S., 615, 621, it was said:

"We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of this act, certainly consorts with equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in

case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive and to require from him the repayment of moneys to which he had supposed himself entitled and upon the expectation of which he had made his contracts with the Government."

In United States *v.* California, etc., Land Co., 148 U. S., 31, 43, it was said:

"Further, the significance of the certificates of the governors, as an independent matter in this inquiry, must not be overlooked. Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal his or its determination is conclusive. Thus in the case of United States *v.* Arredondo, 6 Pet., 691, 729, this court said: 'It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter *and* individual rights will not be disturbed collaterally for
273 anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public or any person denying its validity are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive (1 Cranch, 170, 171), legislative (4 Wheat., 423; 2 Pet., 412; 4 Pet., 563), judicial (11 Mass., 227; 11 S. & R., 429, adopted in 2 Pet., 167, 168), or special (20 Johns., 739, 740; 2 Dow P. C., 521, etc.), unless an appeal is provided for or other revision by some appellate or supervisory tribunal is prescribed by law.' See also the following cases: Foley *v.* Harrison, 15 How., 433, 448; Johnson *v.* Towsley, 13 Wall., 72, 83; Smelting Company *v.* Kemp, 104 U. S., 636, 640; Shepley *v.* Cowan, 91 U. S., 330, 340; Moore *v.* Robbins, 96 U. S., 530, 535; Quinby *v.* Conlan, 104 U. S., 420, 426; Steel *v.* Smelting Co., 106 U. S., 447, 450; Lee *v.* Johnson, 116 U. S., 48, 51; Wright *v.* Roseberry, 121 U. S., 488, 509."

See also United States *v.* Union Pacific R. Co., 148 U. S., 562; United States *v.* Denver, etc., R. Co., 150 U. S., 1; Chandler *v.* Calumet Mining Co., 149 U. S., 79; United States *v.* Dalles, etc., Co., 7 U. S. App., 297, affirmed in 148 U. S., 49.

Section 6 of the general act of 1854 provided "that any railroad company having completed and put in running order a section of twenty-five miles or more of its road may give notice of the same to the governor, whose duty it shall be to appoint some skillful engineer, if there be no State engineer, to examine said section of road, and if upon the report of said engineer under oath it shall appear that said road has been constructed in accordance with the provisions of its charter and of the general laws of the State
274 in force at the time regulating railroads, thereupon it shall

be the duty of the commissioner of the general land office to issue to said company patents," etc. (Gen. Laws 1854, p. 13). By the special act of September 21st, 1866, relating to this company, it was provided that " whenever said company shall have completed and put in running order a section of twenty-five miles or more of its road beyond the point which land has been granted and drawn they may give notice of the same to the governor, whose duty it shall be to appoint some skillful engineer to examine such section of road, and if upon the report of said engineer under oath it shall appear that the said road has been constructed in accordance with the provisions of its charter and of the general laws of the State in force at the time regulating railroads, thereupon it shall be the duty of the commissioner of the general land office to — said company certificates," etc. (Special Laws 1866, p. 33.)

It would be difficult to conceive of a case demanding more imperatively the application of the just principles running throughout all these decisions. The laws granting the lands for the construction of the road stand in the broadest and most unmistakable terms on the statute books. The road contemplated by such laws has been completed in accordance therewith many years ago. The executive officers of the State whose duty it was to ascertain the fact of construction in the performance of such duty determined such fact and issued the certificates authorized by such laws. The certificates have been located, the title to the lands acquired, and the lands have been mortgaged to secure bonds issued upon the faith in a large measure of the security thus afforded. The mortgages have been foreclosed and title passed to purchasers in good faith thereunder.

The contract between the State and the company, evidenced by the legislation in question and construction of the road,
275 is in all respects and to the fullest extent an executed contract. The transaction is completed. The State not only stood by and permitted the company to proceed with the construction of the road in the reasonable expectation of deriving the benefit of these acts, but through its executive officers recognized to the fullest extent the obligation resting upon it under such acts. It inspected the road as different sections were completed and issued certificates therefor and recognized their location in the manner provided by law. It has reaped all the benefits contemplated by such legislation. It has secured all for which it contracted. It induced by its action the fulfillment by the company of its part of the contract by performing from time to time its own obligations thereunder. In the full enjoyment of all the benefits and advantages for which it bargained, it now, at this late day, seeks to repudiate it and, while retaining its benefits, endeavors to escape its obligations and withdraw and retake the consideration with which it once parted in the utmost good faith. We have said that the State does this, but in this we are not entirely accurate. The State has never by any legislative action sought to repudiate its contract and reclaim the grant. It has never instituted any direct proceeding for the purpose of setting aside, upon any grounds known to courts of

equity, its executed contract—a contract fully performed by both parties. It is the attorney general (whose authority we deny and which in any event is extremely doubtful) who brings this simple action of trespass to try title for the purpose of setting aside a completed transaction of the State—a solemn contract which has been fully performed by both parties and which, certainly, it should not be lightly assumed that the State would undertake to set aside, in any event, without an expression of its purpose to do so in some formal mode employed for the expression of the sovereign
276 will. He seeks to accomplish this purpose and to overturn the action of the State with respect to a long-completed transaction by a simple action designed merely for the settlement of questions of title between individuals. He does not pretend that there was any fraud in the transaction, for no one could reasonably charge that there was. He does not deny the utmost good faith upon the part either of the company or the officers of the State who were required by law to deal with the matter. He ignores and sets at naught the ancient and familiar principle of law that the action of the executive officers of the State within the apparent scope of their authority is presumed to be lawful and valid and based upon facts warranting their action. He advances, neither in his pleadings nor proof, a single ground or circumstance that would entitle any litigant in a court of equity to relief against an executed and completed transaction. It is boldly a collateral attack, without a single allegation or fact that would support even a direct proceeding, upon a completed and fully executed contract and transaction of the State government. The statutes in question and the physical existence of the railroad afford complete evidence of the fulfillment of the contract by both parties long before this suit was instituted. It was fulfilled to the satisfaction of both parties. They both regarded it as fulfilled and have acted upon it accordingly for many years. Running throughout the cases hereinbefore cited and referred to in the Supreme Court of the United States is the principle, clearly defined and often applied, that where the executive department has acted with respect to such matters the only questions that can arise are power in the officer and fraud in the party. There is no pretense that there was any fraud, and it is not possible that there could have been any, and it is not even claimed that there was any mutual mistake.

We submit with entire confidence that if the State could set aside this completed and fully executed transaction at all it
277 could only do so by a direct proceeding in an appropriate action for that purpose based upon some of the grounds known to equity jurisprudence (Chandler *v.* Calumet Co., 149 U. S., 79, 93; United States *v.* Hughes, 11 Howard, 552). It is impossible for it to do so in a collateral proceeding of this character. Suppose, for instance, that some private person or individual had filed upon the lands in question and had then brought an action against the company for recovery of the land upon the ground that the company was not entitled to it because it had failed to construct its road within the time required by law, will any one contend that

such an action could be maintained? Would any one deny that judgment in such case must inevitably be for defendant? Yet this is precisely such an action. The fact that the State is the party plaintiff makes no difference. It is a collateral attack upon an executed contract and completed transaction of the State which can be set aside, if at all, only in a direct proceeding and appropriate action for that purpose. G., H. & S. A. R'y Co. *v.* State, 81 Texas, 572, is directly in point here. That was a suit by the State in the form of an action of trespass to try title, in which the attorney general contended upon grounds, among others, that the company having failed to construct its road within the time required by law, it had forfeited its charter and consequently its right to the lands in question, and asked judgment on that ground regardless of others. It was held that such forfeiture could be enforced, if at all, only in a direct proceeding for that purpose, and in effect that it could not be claimed in a collateral proceeding of this character. It seems to us that the principle there recognized is entirely applicable here, and that under the most favorable view of the State's case it cannot, in a collateral proceeding in the form of an action of trespass to try title, take advantage of a ground of forfeiture that should
278 be enforced, if at all, only in a direct proceeding for that purpose; and even if this were not so we contend and have endeavored to show that both the State's petition and the proof in this action are wholly insufficient to support it, inasmuch as it seeks to set aside a completed transaction and a fully executed contract of the State without any allegations of fraud, or even mutual mistake or any other ground known to equity jurisprudence, by the principles of which the State is as much bound as is any private litigant.

We submit, therefore, that the contract having been fully executed by both parties and acted on for many years and having been fully completed long ago, it cannot be set aside in the manner here sought, and could not have been at any time without some allegation and proof of fraud on the part of the company, or an entire absence of power upon the part of the executive department, whose action is attempted to be annulled, and we earnestly insist that upon no principle known to the law can the judgment be sustained.

Twelfth.

Olcott as a Bona Fide Purchaser.

The said court of civil appeals erred in overruling petitioners' fifteenth assignment of error, complaining, in effect, of the action of the court below in holding that petitioner Olcott, having taken title under the certificates, was affected with notice of their alleged invalidity under the constitution of 1869.

Statement.

See Brief, pages 21–23. See also the fifteenth ground of petitioners' motion for rehearing. The proof showed (Trans., 102, 103) that

the lands in question were mortgaged in 1866, 1870, 1872, 1875, 1877, and 1881, and the court below found as a fact (Trans., 279 56) that petitioner Olcott purchased under foreclosure of those mortgages in 1888, paying therefor a consideration of $10,508,000, and that deed was made and delivered to him January 8th, 1889. This suit was not commenced until February 3d, 1890. The court below also concluded, as matter of law (Trans., 57), that such sale was effectual to convey to Olcott the title and interest in and to said lands theretofore owned by the railway company. It also held, as matter of law (Trans., 58), that Olcott, having taken title under the certificate, no patents having been issued, was affected with notice of their alleged invalidity under the constitution of 1869. It also found as a fact (Trans., 56) that after the location of the lands they had been platted upon the map in use by the general land office, and had been recognized by all the land commissioners as the lands of the railway company, and said company had paid all taxes accruing thereon.

Authorities.

Wimberly *v.* Pabst, 55 Tex., 587.
Moelle *v.* Sherwood, 148 U. S., 21.
United States *v.* Budd, 144 U. S., 154, 167.
Maxwell Land Grant case, 121 U. S., 325.
Colorado Coal Co. *v.* United States, 123 U. S., 307.
Chandler *v.* Calumet, etc., R. Co., 149 U. S., 79.
United States *v.* Williamette, etc., Co., 55 Fed. Rep., 711, 717.

Argument.

What we have said under the preceding ground of this application is applicable here. Olcott is as much an innocent purchaser of the lands in question as if patents had been issued. While the particular sections in suit had not been patented, many others had been. The State is as much bound by the issuance and location of the certificates and its actions in the premises as if it had issued the patents. The company had acquired an equitable title and the complete beneficial ownership of the lands. It may be true 280 that the complete legal title would not vest until the patents should issue, but the right of the State had ceased and the right of the company had vested by the issuance and location of the certificates as provided by law. This is too well settled to admit of discussion. The lands had been mortgaged by the company not only as authorized by general law, but as expressly authorized by the company's charter (Special Laws 1856, page 29). Olcott's rights as purchaser of course relate back to the various mortgages. Whatever rights vested thereunder in the holders of the bonds passed to Olcott by the foreclosure and sale to him, regardless of the form of the deed he received. The State had issued the certificates, had permitted them to be located, had recognized their location, had treated the land as belonging to the company, and had accepted

taxes accruing on it for years. It had authorized the company to mortgage the lands and to borrow money upon the faith of the security thus afforded. It had not by any legislative action sought to reclaim the land or repeal any of the laws standing upon the statute books expressly granting them, and had taken no judicial proceeding for the purpose of reclaiming the lands whereby a purchaser would have been put upon inquiry. As we have seen, the statute books of the State abounded with acts expressly granting these lands. The bondholder or purchaser could see that the road contemplated by those acts had been constructed and had been in operation for many years. There was nothing to put him on inquiry as to the time when the different sections of the road were completed. He found that the executive officers of the State, whose duty it was to determine the facts in reference to construction, had issued the certificates authorized by law. Can it be possible that he was required to look beyond this, and to institute an inquiry as to the time when the different sections were completed?

281 Can it be possible that any such burden rested upon him? Where would he have gone for the evidence? The State had never instituted any action questioning the fact. Registration records and the court records were absolutely silent. On the other hand, he had the very highest evidence of completion in the time required by law in the certificates issued by the executive department, and located with their recognition and approval. He had also the potential evidence afforded by the existence of the statutes granting the land and by the completed and existing road contemplated thereby. It would be impossible, we submit, to conceive of a case more strongly demanding the protection of *bona fide* purchasers.

If there had been no law granting the lands, or if the grant under the terms of the statute had been doubtful, the case would be different; but the laws were explicit and the grant intended by them was absolutely beyond question. There could, therefore, be no doubt suggested to the mind of the purchaser from the reading of the statutes as to the law, and so far as the facts were concerned he found the highest evidence in the completion of the road and the issuance of the certificates by the executive department. There is no other record of the facts—indeed, no other way open to him for definitely ascertaining the facts. We submit, therefore, that the purchaser of the bonds issued by the company and secured by mortgages upon these lands, and whose rights Olcott has, was unquestionably a *bona fide* purchaser, whose rights, upon every principle of justice, the court should sustain. As was said by this court in Wimberly *v.* Pabst, 55 Texas, 587, 592:

"To the public generally a patent to land having been issued by authority of the State carries with it a high degree of faith and credit as the beginning link in the legal chain upon which all after-acquired title can securely depend. When, therefore, a subsequent purchase is made upon the faith of a patent, regular upon its

282 face, public policy requires that it should constitute an important element in the good faith of the transaction and

should turn the scale in its favor, except in cases of actual notice or when the law would impute constructive notice of some defect sufficient to defeat it."

What is here said of a patent as between private persons is equally true of the issuance and location of a certificate, as in this case, against the State. The State should not be permitted to entrap innocent persons in the manner illustrated by the judgment in this case. As was said by the Supreme Court of the United States in Woodruff *v.* Trapnall, 10 How., 190, 207, "We naturally look to the action of a sovereign State to be characterized by a more scrupulous regard of justice and a higher morality than belong to the ordinary transactions of individuals."

We commend to the court the principle and spirit running throughout the authorities cited above in support of this ground, and also refer, without repetition, to all we have said in argument respecting the effect of the action of the executive department in the premises in support of the last preceding ground of this application.

Thirteenth.

As to Estoppel.

The said court of civil appeals erred in overruling and holding not well taken petitioners' twentieth assignment of error, which in effect complained of the action of the court below in rendering judgment against petitioner Olcott, when the uncontroverted evidence showed that by making the grants through legislative action, accepting the construction of the road and issuing the patents, permitting them to be located, and recognizing them as valid, and permitting the company to mortgage the land and sell its bonds secured thereby,
283 and in acknowledging the ownership of the land by the company for many years and until they had passed in the hands of innocent purchasers, the State became and was estopped to claim them in this action against such innocent purchaser.

Statement.

See Petitioners' Brief, pages 27, 28, and the statement under the last preceding ground of this application.

Authorities.

Johnston *v.* Smith, 21 Tex., 722, 729, 730.
San Antonio *v.* Jones, 28 Tex., 33, 34.
State *v.* Morris & Cummings, 73 Tex., 440.
2 Morawetz on Corporations, 1029.
Woodruff *v.* Trapnall, 10 How., 190.
Carver *v.* Jackson, 4 Peters, 1, 87.
United States *v.* Willamette, etc., Co., 54 Fed. Rep., 807, 811.
Cohn *v.* Barnes, 5 Fed. Rep., 326.
State *v.* Milk, 11 Fed. Rep., 397.
Pengra *v.* Munz, 29 Fed. Rep., 830.
Commonwealth *v.* Andre, 3 Pick. (Mass), 224.
Commonwealth *v.* Pejepscot, 10 Tyng. (Mass.), 154.

tioner railway company was not entitled to the grant for the construction of its line to San Antonio. Petitioner railway company in due time presented to the said district court its application to remove this cause into the Federal court upon the ground, in effect, that the suit was one arising under the Constitution and laws of the United States, claiming that petitioner had proceeded under its charter and the acts relating to it to construct, and had constructed prior to the adoption of the constitution of 1869, an important part of its line at large expense, and had acquired thereby and under the laws above mentioned a contract and vested right to the land grant in question, and that the constitution of 1869, pleaded and referred to in the State's petition, impaired the obligation of such contract, in violation of section X, article 1, of the Constitution of the United States, and deprived petitioner railway company of property without due process of law, in violation of section 1 of the fourteenth amendment of said Constitution; but said application to remove said cause into the circuit court of the United States was by said district court of Brewster county denied and refused, and said district court proceeded with the trial of the same; which action and ruling of said district court was, on appeal therefrom, as aforesaid, by petitioner railway company, affirmed by the said court of civil appeals by the judgment herein complained of,
249 whereby petitioners say that said court decided against the title, right, privilege, and immunity so specially set up and claimed in said suit by petitioners under the Constitution and statutes of the United States and the commission held and authority exercised under the United States.

Your petitioners refer to the assignment of errors filed herewith and pray that the same be considered for the purposes of this petition as a part hereof, and further pray that a writ of error may be allowed and issued herein to the said court of civil appeals in and for the fourth supreme judicial district of the State of Texas, which now has the record in said suit, for the removal of said cause into the Supreme Court of the United States, to the end that the errors in said judgment and in the proceedings in said cause may be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, and that the transcript of the record, proceedings, and papers in said cause, duly authenticated, may be sent to the said Supreme Court of the United States.

T. D. COBBS,
J. P. BLAIR,
JAS. A. BAKER,
R. S. LOVETT,
Attorneys for the Galveston, Harrisburg & San Antonio Railway Company, E. P. Hill, and W. N. Shaw, Petitioners.

Allowed by—

J. H. JAMES,
Chief Justice of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

250 [Endorsed:] No. 385. The Galveston, Harrisburg & San Antonio Railway Co. *et al. vs.* The State of Texas. Petition to the United States Supreme Court for writ of error. Filed in the court of civil appeals, at San Antonio, Texas, Jun- 24, 1897. H. E. Hildebrand, clerk.

251 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the court of civil appeals in and for the fourth supreme judicial district of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals in and for the fourth supreme judicial district of Texas, before you or some of you, being the highest court of the said State in which a decision could be had in said suit between The Galveston, Harrisburg & San Antonio Railway Company, appellant, and The State of Texas, appellee, and E. P. Hill and W. N. Shaw, as sureties, on the appeal bond of said appellant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, or wherein a title, right, privilege, or immunity was claimed under the Constitution or a treaty or statute of or commission held or authority exercised under the United States and the decision was against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority, a manifest error has happened, to the great damage of the said The Galveston, Harrisburg & San Antonio Railway Company and E. P. Hill and W. N. Shaw, the sureties on its appeal bond, as by their complaint appears, we, being willing that error, if any
252 hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 24th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

[The seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.]

D. H. HART,
Clerk of the Circuit Court of the United States
for the Western District of Texas,
By —— ——, *Deputy.*

Allowed by—

J. H. JAMES,
Chief Justice of the Court of Civil Appeals of the
Fourth Supreme Judicial District of Texas.

253 [Endorsed:] G., H. & S. A. R'y Co. *et al.*, appellant-, *vs.* The State of Texas, appellee. Original writ of error. Filed in the court of civil appeals, at San Antonio, Texas, Jun- 24, 1897. H. E. Hildebrand, clerk.

254 UNITED STATES OF AMERICA, *ss:*

To The State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of civil appeals in and for the fourth supreme judicial district of Texas, wherein The Galveston, Harrisburg & San Antonio Railway Company, E. P. Hill, and W. N. Shaw are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

J. H. JAMES,
Chief Justice of the Court of Civil Appeals for the
Fourth Supreme Judicial District of Texas.

255 Came to hand on the 5th day of July, 1897, and executed on the 6th day of July, 1897, by delivering, at Austin, Texas, in my district, to C. A. Culberson, governor of the State of Texas, and to M. M. Crane, attorney general of the State of Texas, each in person, a true copy of this writ.

R. C. WARE,
U. S. Marshal,
By FRED. PECK, *Deputy.*

Serving 2 copyies of citation, $4.00.

256 [Endorsed:] Galveston, Harrisburg and San Antonio, Railway Company, plaintiff in error, *vs.* The State of Texas, defendant in error. Citation on writ of error. Filed in the court of civil appeals, at San Antonio, Texas, Jul- 10, 1897. H. E. Hildebrand, clerk.

Endorsed on cover: Case No. 16,634. Texas court of civil appeals, 4th supreme judicial district. Term No., 421. The Galveston, Harrisburg & San Antonio Railway Company and E. P. Hill and W. N. Shaw, plaintiffs in error, *vs.* The State of Texas. Filed July 22d, 1897.